EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

(?)

No. 85-5221-CSY
Status: GRANTED

Docketed:
August 9, 1985

Title: Randall Lamont Griffith, Petitioner
v.
Kentucky

Court: Supreme Court of Kentucky

Counsel for petitioner: Marshall, Larry H., Yanish, Joanne M.

Counsel for respondent: Martin, David K., Richwalsky Jr., Paul B.

Entry	Date	Note	Proceedings and Orders
1	Aug 9 1985	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 12 1985		DISTRIBUTED. September 30, 1985
4	Sep 14 1985	X	Brief of respondent Kentucky in opposition filed.
5	May 28 1986		REDISTRIBUTED. May 29, 1986
7	Jun 2 1986		Petition GRANTED. Limited to the following question: In cases pending on direct appeal, should the holding in Batson v. Kentucky, 476 U.S.__(1986), be given retroactive effect? The case is set for oral argument in tandem with No. 85-5731, Brown v. United States.
			**********
9	Jul 7 1986		Order extending time to file brief of petitioner on the merits until August 1, 1986.
10	Jul 17 1986		Joint appendix filed.
11	Jul 28 1986		SET FOR ARGUMENT. Tuesday, October 14, 1986. (3rd case) (1 hour).
12	Jul 31 1986		Brief amicus curiae of Natl. Assn. of Criminal Defense Lawyers, Inc. filed. VIDED.
13	Aug 1 1986		Brief amicus curiae of Natl. Legal Aid and Defender Assn. filed.
14	Aug 1 1986		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
15	Aug 2 1986		Record filed.
16	Aug 2 1986		Certified original record, 6 volumes, received.
17	Aug 1 1986		Brief amicus curiae of NAACP Legal Defense & Educational Fund, Inc., et al. filed. VIDED.
18	Aug 5 1986		Brief of petitioner Randall L. Griffith filed.
19	Aug 13 1986	D	Motion of petitioner to reschedule oral argument filed.
20	Aug 27 1986		CIRCULATED.
21	Sep 3 1986		Motion of petitioner to reschedule oral argument DENIED.
22	Sep 5 1986		Brief of respondent Kentucky filed.
23	Sep 5 1986	X	Brief amicus curiae of NC Attorney General, et al. filed.
24	Oct 14 1986		ARGUED.

EDITOR'S NOTE

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NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

LARRY H. MARSHALL
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FRANKFORT, KENTUCKY 40601

Joanne M. Yanish
OF COUNSEL

August 9, 1985

2 pp

QUESTION PRESENTED

IN A CRIMINAL CASE, DOES A STATE TRIAL COURT ERR WHEN, OVER THE OBJECTION OF A BLACK DEFENDANT, IT SWEARS AN ALL WHITE JURY CONSTITUTED AFTER THE PROSECUTOR HAD EXERCISED FOUR OF HIS SIX PEREMPTORY CHALLENGES TO STRIKE FOUR OF THE FIVE BLACK VENIREMEN FROM THE PANEL IN VIOLATION OF CONSTITUTIONAL PROVISIONS GUARANTEEING THE DEFENDANT AN IMPARTIAL JURY AND A JURY COMPOSED OF PERSONS REPRESENTING A FAIR CROSS SECTION OF THE COMMUNITY AND EQUAL PROTECTION OF THE LAW?

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NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF KENTUCKY

The petitioner, Randall Lamont Griffith, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Kentucky entered on June 13, 1985.

OPINIONS BELOW

No written opinion was rendered by the Jefferson County, Kentucky Circuit Court. Following a jury trial, petitioner was convicted of First Degree Robbery [Ky.Rev.Stat. (KRS 515.020)] and Second Degree Persistent Felony (KRS 532.080) on May 16, 1984 (Transcript of Record, hereinafter TR 114, 119). On May 21, 1984, the Jefferson Circuit Court entered final judgment, sentencing petitioner to twenty (20) years imprisonment. (TR 137-138; Appendix, hereinafter A 2,3-4).

By Opinion rendered June 13, 1985, the Supreme Court of Kentucky affirmed petitioner's conviction. The case was styled, Randall Lamont Griffith v. Commonwealth of Kentucky, No. 84-SC-1001-MR. The Opinion was issued as one "not to be published."

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1257(3). The Supreme Court of Kentucky affirmed petitioner's conviction in an unpublished Opinion rendered June 13, 1985. This Petition is, therefore, timely filed pursuant to Sup.Ct.R. 20.1.

CONSTITUTIONAL PROVISIONS INVOLVED

SIXTH AMENDMENT

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed***

FOURTEENTH AMENDMENT, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Petitioner, Randall Lamont Griffith, was indicted on September 27, 1982, for first degree robbery and theft by unlawful taking as well as persistent felony offender in the second degree (TR 1-2). The indictment charged that petitioner had committed robbery by "threatening the use of physical force upon Ms. Collett Ruhl while armed with an ice pick, a dangerous weapon" on or about September 8, 1982 (TR 1). The object of the theft was a purse belonging to Deborah Barnett (TR 1). Ms. Barnett and Ms. Ruhl (later called Weist) were together at the time of the incident (Transcript of Evidence, Volume I, hereafter TE I 37, 44-45).

Petitioner's case first proceeded to trial on February 21 and 22, 1984 (TR 83). A mistrial was declared after the jury reported they were unable to reach a unanimous verdict (Id.). Petitioner's case proceeded to trial for the second time on May 15, 1984 (TE I, Cover Page).

On the day of trial, [1] a jury panel was presented for examination and, in accordance with Kentucky practice, each party

[1] For the convenience of the Court, the pertinent parts of the trial record are set out in the Appendix.

was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2)(3)]. (TR 94-96). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory challenges and one extra peremptory due to the calling of extra jurors for examination. [RCr 9.40(1)(2)]. The prosecutor used his peremptory strikes to strike four black jurors (Supplemental Transcript of Evidence, hereinafter STE 38).[2] Following the prosecutor's strikes, one black juror remained (STE 41). However, after random selection by the Clerk pursuant to Kentucky Criminal Rule (hereinafter, CR) 9.30, no blacks remained on the panel (STE 41). As defense counsel, Leo Smith, argued, the result was:

> ...[The] defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury...(STE 41).

Defense counsel moved the trial court to require the prosecutor, Joseph Gutmann,[3] to state his reasons for exercising his peremptories for the record (STE 35, 37, 40, 41). Mr. Smith also moved for discharge of the panel on the basis of a violation of his client's constitutional right to jury made up a fair cross section of the community (STE 38, 40). Both defense motions were overruled (STE 40, 42). The jury was then sworn for service on Mr. Griffith's case (TE I 35).

Collett Wiest testified that on September 8, 1982, she and Deborah Barnett stopped on Poplar Level Road near the Magic Mart to use the telephone at the phone booth (TE I 36-65). Ms. Barnett asked Ms. Wiest to bring her purse from the car, which she did (TE I 43). Barnett got her cigarettes from her purse and tossed the purse to the hood of the car where Ms. Wiest was sitting (Id.). While Ms. Wiest was sitting on the hood of the

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[2]One of those four black panel members had also been struck by the defense (STE 38, TR 94).

[3]Mr. Gutmann is the same Commonwealth Attorney who prosecuted the case of Batson v. Kentucky, No. 84-62-6263, presently pending before this Court on certiorari. In Batson the defendant challenged the swearing of an all white jury after the prosecutor exercised his peremptory challenges to strike all of the black venireman from the panel.

car, a black male with a short afro, between 5'5" and 5'7" and 150 lbs. walked up to Ms. Barnett's purse, put his hand on the purse and held a knife up to Ms. Wiest, picking up the purse (TE I 44-45). He then put the purse under his arm and walked back to the apartment behind them (TE I 46). Ms. Barnett testified similarly. She also testified to her pretrial identification of petitioner from a photopack.

Stephanie Kittrel, according to her testimony, was on her way to the store when she saw a man grab a lady's purse (TE II 134). She saw that man draw a knife on the woman (Id.). She made an in court identification of petitioner (TE II 136). According to Kittrel, the man who took the purse lived in the apartments near her (TE II 136). On cross-examination she admitted that two or three weeks later she notified police that she saw a man who resembled the man involved in the robbery (TE 145). Later during petitioner's testimony he testified he was in jail following his arrest September 17 through October 1982 (TE II 201). Two police detectives also testified concerning the identification of petitioner by the witnesses (TE I 153-16).

Based on the evidence, the jury returned a verdict of guilt on the charge of first degree robbery, recommending a punishment of ten (10) years (TE II 247-248). The punishment was enhanced pursuant to Kentucky's Persistent Felon Law to a total of twenty (20) years (TR 137-138, A 3-4).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky (TR 142). [RCr 12.02]. In the briefs filed by Randall Lamont Griffith in that court, he argued that the prosecutor's action deprived him of the right to trial by an impartial jury guaranteed by the Sixth Amendment of the United States Constitution and Section Eleven of the Constitution of Kentucky. The argument presented by the Petitioner noted a distinction between the rule introduced in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), for equal protection analysis and the requirements of the Sixth Amendment of the United States Constitution. Petitioner also argued that his

right to equal protection of the law was denied. Petitioner asked the Supreme Court of Kentucky to reverse the judgment and to order a new trial.

In an unpublished Opinion rendered on June 13, 1985, the Supreme Court of Kentucky rejected petitioner's argument holding that it was of the opinion "Swain disposes of this issue and we decline to go further than the Swain Court" (A 2). The judgment of the circuit court was affirmed (A 2).

REASON FOR ISSUANCE OF THE WRIT

> THE DECISION OF THE KENTUCKY SUPREME COURT CONFLICTS WITH McCRAY V. ABRAMS, A DECISION OF THE SECOND CIRCUIT COURT OF APPEALS. IMPORTANT FEDERAL QUESTIONS INVOLVING THE SIXTH AMENDMENT RIGHT TO AN IMPARTIAL JURY AND THE FOURTEENTH AMENDMENT RIGHT TO EQUAL PROTECTION ARE SOLIDLY PRESENTED IN THIS CASE. THERE IS A CONFLICT OF AUTHORITY IN THE FEDERAL COURTS ON THIS QUESTION. FINALLY, THIS COURT HAS RECENTLY GRANTED CERTIORARI ON A VERY SIMILAR QUESTION IN BATSON V. KENTUCKY, 84-6263.

This case presents the important question of whether the Constitution allows a prosecutor to use peremptory challenges in jury selection solely on the basis of the prospective juror's race. The matter of improper use of peremptory challenges by a prosecutor is an issue that involves the Sixth Amendment of the United States Constitution because such challenges can result in a jury that does not represent the community and which may, therefore, prevent a trial before a fair and impartial jury. In Taylor v. Louisiana, 419 U.S. 522, 530, 95 S.Ct. 692, 698, 42 L.Ed.2d 690 (1975), the Court accepted as a necessary component of a fair trial a jury made up of a fair cross section of the community. Such a jury is required as a prophylaxis against arbitrary exercise of authority. [Taylor v. Louisiana, 419 U.S. at 530, 95 S.Ct. at 698]. Acknowledgment of this fundamental requirement has called into question the rule concerning peremptory challenges set out in Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). In that case, the Court held that the equal protection clause of the Fourteenth Amendment does

not afford a criminal defendant the right to question the prosecutor's use of peremptory challenges in any one case. [380 U.S. at 222, 85 S.Ct. at 837]. A presumption of rectitude was assigned to the prosecutor which could be rebutted only by a showing that the prosecutor over a period of years struck all blacks from jury panels. [380 U.S. at 223; 85 S.Ct. at 837]. In recent years, this rule has come under increasingly strident attack. The gist of these attacks has been

> There is no point in taking elaborate steps to ensure that Negroes are included on venires simply so they can be struck because of their race by a prosecutor's use of peremptory challenges. [Dissent from denial of certiorari, McCray v. New York, ___ U.S. ___, 103 S.Ct. 2438, 2442, 77 L.Ed.2d 1332 (1983)].

The history of the United States gives ample support to the conclusion that minorities, blacks in particular, are subject to treatment based on racial stereotypes rather than individual characteristics and merit. The Thirteenth, Fourteenth, and Fifteenth Amendments of the United States Constitution bear witness to the existence of racial discrimination. The recent renewal of the Voting Rights Act of 1965 is further evidence of continued unequal treatment of blacks. [June 29, 1982, P.L. 97-205, 42 U.S.C.S. §1971 et. seq.]. It is, therefore, not surprising that the exclusion of blacks from juries by means of peremptory challenges exercised by representatives of the state creates the suspicion that racial stereotypes rather than individual unsuitability for jury service on a particular case are the motives for the challenges. It is necessary to have some reasonable means to probe the motives of the prosecutor. The means provided by Swain is not sufficient to the task. The requirement of showing a long term systematic exclusion of blacks is an insuperable obstacle to redress of constitutional rights. [McCray v. New York, dissent from denial of certiorari, 102 S.Ct. at 2440]. Without a determined effort by the defense bar, which tends to be composed of sole practitioners and small firms, the record keeping required to show the required "pattern of conduct"

in any one area likely cannot be done. In any event, the requirement of Swain is an excessive burden in light of the relief that customarily will be sought in cases where the prosecutor's challenges are questioned.

The common point of departure of the recent cases from the Swain rule is that the prosecutor will have to explain his actions where he has struck most or all of the members of a cognizable group and there is a likelihood that the members are being challenged only because they are members of the group. [People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); Commonwealth v. Soares, 377 Mass. 461, 387 N.E.2d 499 (1979); McCray v. Abrams, 750 F.2d 1113 (2 Cir. 1984)]. Once such a prima facie showing was made, the burden then shifts to the prosecution "to show if he can that the peremptory challenges in question were not predicated on group bias alone" People v. Wheeler, supra at 765. The right to an impartial jury made up of a fair cross section of the community is of sufficient importance to require adoption of a new rule to protect the right. The Court has impliedly recognized the need.

In 1983 the Court voted to deny certiorari in a group of cases collected under the name of McCray v. New York, _____U.S._____, 103 S.Ct. 2438, 77 L.Ed.2d 1322 (1983). Two justices dissented, arguing that the petition should be granted for reasons similar to those presented in this Petition. [103 S.Ct. at 2439]. Three other justices agreed that the discriminatory use of peremptory challenges merited consideration but preferred to allow other Courts to consider the question in order to "enable us to deal with the issue more wisely at a later date." [103 S.Ct. at 2438].

A second reason for review is the conflict of opinion recently created in the federal court system. On December 4, 1985, the United States Court of Appeals for the Second Circuit rendered an Opinion styled McCray v. Abrams, 750 F.2d 1113 (1984), which held that Swain continued to control cases presented on equal protection principles, but that another approach based on

the Sixth Amendment to the United States Constitution was possible. That court held that discriminatory use of peremptory challenges by the prosecutor violated the right to trial by a jury composed of a fair cross section of the community. A two-part showing by the defendant was devised by which the defendant is required to show that the group that is challenged is "cognizable" and that there is a "substantial likelihood" that the challenge was based on group affiliation. If such a showing is made, then the prosecutor must show that his strikes were "racially neutral." Unless the prosecutor satisfies the trial court that permissible reasons motivated his peremptory challenges, the picked jury must be discharged and a new jury selected from a different panel.

It may readily be seen by referring to the recent cases of United States v. Thompson, 730 F.2d 82 (8 Cir. 1984) and United States v. Whitfield, 715 F.2d 145 (4 Cir. 1983), that McCray v. Abrams creates a conflict of authority in the federal courts. The Court should act to resolve this conflict.

Another important reason for review of this case is that state court decisions are in obvious conflict with a large number of states holding to the equal protection analysis of Swain v. Alabama, while some few states have changed to a principle of fair representation on a jury pursuant to the Sixth Amendment of the United States Constitution.

A review of cases decided since 1978, when People v. Wheeler was issued, shows that at least seven states have considered the Swain rule and its alternatives. (A table of these cases is found in the Appendix at page 13. The cases are compiled under the headings that follow).

Of the twenty-seven cases reviewed, fifteen (15) have reaffirmed adherence to Swain either by direct citation or by requiring evidence of long standing and systematic exclusion to justify relief. Of the fifteen states that have followed Swain, seven (7) chose the Swain rule in cases decided in 1981 and 1982. Indiana, Louisiana, and New York reiterated their already established allegiance to Swain. Four states would not or could

not decide the issue in the case that was presented. Two states decided cases on the ground that a defendant has no right to a particular jury. One jurisdiction, the District of Columbia, ruled that Wheeler and Soares were decided on state constitutional grounds and that, therefore, the federal constitution was not raised by the question of improper challenges.

Since 1978-1979 when Wheeler and Soares were decided, only New Mexico, Florida and Arizona have established new rules. New Mexico solved the problem by saying that its courts would consider arguments made pursuant to Swain or Wheeler-Soares. Florida adopted a new rule similar to Wheeler-Soares in 1984, as did New Jersey in 1985.

A final and important reason for granting certiorari in this case is the fact that this Court granted certiorari on April 22, 1985, in Batson v. Kentucky, No. 84-6263, which presents a very similar issue to the one at bar. In Batson, the petitioner asked the Court to consider whether a trial court errs in violation of the Sixth Amendment by swearing, over objection of a black defendant, an all-white panel after a prosecutor had exercised four of his six peremptory challenges to strike all of the black veniremen from the panel. This case presents a very similar question with one added twist. In this case, the prosecutor, Mr. Gutmann,[4] used his peremptories to strike four of the five black venireman. Thus, this case presents the scenario addressed in Commonwealth v. Soares in which the prosecutor struck most but not all members of the cognizable groups.[5] Petitioner's case squarely presents the inevitable question of tokenism as it relates to the discriminatory use of peremptories. Obviously, if this Court should hold in Batson that peremptorily striking all black members of a panel amounts to a prima facie showing that the peremptories were exercised on the impermissible basis of race, prosecutors could attempt to defeat inquiry into the motive behind

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[4]As noted earlier, Mr. Gutmann was also the prosecutor in Batson who used his peremptories to strike all black venireman from the panel. In this case he struck four of the five black members.

[5]In Soares, the prosecutor had struck twelve of the thirteen black members of the venire.

strikes by leaving one or two blacks on a panel. Thus, it will be important in fashioning a test to take this tokenism account as other courts have done. To put an end to the use of peremptories by prosecutors based on race, this Court should adopt the standard for a prima facia case of the striking of most or all cognizable group members. This case allows the Court to directly address that question.

This case would make an excellent vehicle by which to settle the question of improper use of peremptory challenges. Most blacks were removed from the jury because of the prosecutor's peremptory challenges. The majority of the discrete group was removed from the jury. This raises the suspicion that the strikes were made for reasons of group association rather than the individual's lack of fitness to serve on the jury. For the reasons shown in this Petition, the Court is urged to grant the writ prayed for.

CONCLUSION

For all the reasons stated above, a writ of certiorari should issue to review the opinion of the Kentucky Supreme Court.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

COMMONWEALTH OF KENTUCKY — RESPONDENT

APPENDIX

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RENDERED: June 13, 1985
NOT TO BE PUBLISHED

Supreme Court of Kentucky

84-SC-1001-MR

RANDALL LAMONT GRIFFITH — APPELLANT

V.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE KEN G. COREY, JUDGE
82-CR-1449

COMMONWEALTH OF KENTUCKY — APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Randall Lamont Griffith was convicted of first-degree robbery and as a second-degree persistent felony offender. He was sentenced to a term of twenty years' imprisonment. We affirm.

Griffith asserts that the Commonwealth improperly struck blacks from the jury that tried him. The Commonwealth peremptorily excused four blacks and two whites. One black was excused by random selection by the clerk.

Griffith, a black, insists the Commonwealth must explain why peremptories were exercised against blacks. The Commonwealth's attorney denied race as a reason for striking,

and the trial court declined to discharge the jury. Swain v. Alabama, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), held that the striking of all blacks from a jury panel in a particular case is not a denial of equal protection. We are of the opinion Swain disposes of this issue, and we decline to go further than the Swain court.

Griffith next asserts that the trial court erroneously permitted witnesses for the prosecution to testify as to their identification of Griffith and in permitting police officer witnesses to also testify as to the witnesses' identification of Griffith. We have examined the authorities cited and conclude this testimony was not erroneously admitted.

The judgment is affirmed.

All concur.

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JEFFERSON CIRCUIT COURT
NINTH DIVISION
JUDGE KEN G. COREY

NO. 82CR1449

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS JUDGMENT AFTER JURY TRIAL

RANDALL LAMONT GRIFFITH DEFENDANT

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment, Count 1, Robbery I, Count 2, T.B.U.T. U/100.00, dismissed; Count 3, P.F.O. II and having on the 15th day of May, 1984, appeared in open court with his attorney Honorable Leo Smith, the case was tried before a jury which returned the following verdict: VERDICTS UNDER INSTRUCTION NO. 1, ROBBERY IN THE FIRST DEGREE: WE, THE JURY, FIND THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR TEN YEARS. /S/ STEVEN L. NELSON, FOREPERSON.

After the jury returned their verdict of guilt, the second phase of the trial began; the defendant being charged as a P.F.O. II. Evidence was heard and the jury returned the following verdict: VERDICTS UNDER INSTRUCTI NO. 1 PERSISTENT FELONY OFFENDER IN THE SECOND DEGREE: WE, THE JURY, FIND THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, and fix his punishment at confinement in the penitentiary for Twenty Years, in lieu of our previous recommendation. /S/ STEVEN L. NELSON, FOREPERSON.

Pursuant to KRS. 532.052, the court, having explained the defendant's right to a presentence investigation report, the defendant, in person and by counsel, expressly waived such right and requested that the Court proceed

with sentencing immediately.

No sufficient cause having been shown why judgment should not be pronounced, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the following charges: COUNT 1, ROBBERY I, COUNT 3, P.F.O. II and is Sentenced to 10 Years on Count 1, enhanced to 20 Years on Count 3, fo a total of 20 years in Bureau of Corrections.

IT IS FURTHER ORDERED that the defendant shall not be entitled to bail and that the sheriff of Jefferson County deliver the defendant to the custo of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED THAT the defendant is hereby credited with time spent in custody prior to sentence, namely as many days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

JUDGE KEN G. COREY

ATTESTED: A TRUE COPY
PAULIE MILLER, CLERK
BY Debbie Moore D.C.

CC: LEO SMITH
JOE GUTMANN

ENTERED IN COURT
MAY 21 1984
PAULIE MILLER, Clerk
By Deputy Clerk

left, waive the calling of the roll?

MR. GUTMANN: Yes, your Honor.

MR. SMITH: Yes, Judge.

THE COURT: All right, as soon as Miss Moore goes there here paper work here, we'll seat the Jury.

MR. SMITH: Judge, approach the bench while we're waiting on that, I think it will same some time, in order to save some time, I'll go ahead and bring this up now.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. SMITH: I have no idea what, in terms of race, the jury is going to consist of. If, by chance, we got an all white jury, I'm going to as that the Court, before discharging the rest, put on the record as to whether or not Mr. Gutmann exercised his strikes as to whether or not the person was black and if so, I think case law gives me the right to have him state for the record the reasons and I'll bring that up now so I don't have to run up after the jury is selected.

MR. GUTMANN: Mr. Smith, I consider that very offensive.

MR. SMITH: Well, needless to say...

MR. GUTMANN: Judge, I want to take exception to that.

THE COURT: Okay.

MR.SMITH: I have no choice but to make

to make that objection.

THE COURT: Just tell me now, did you strike any member of the panel because of their race?

MR. GUTMANN: No, I did not.

THE COURT: Okay. That's sufficient.

MR. SMITH: All I ask, we can wait and if we end up impaneling some blacks, there will be no issue. I have no idea, I simply ask for purposes of the record because it does not indicate race as to how many strikes that we simply list that, does that make sense?

THE COURT: No.

MR. GUTMANN: Mr. Smith, did you strike any whites because they are white?

MR. SMITH: As Mr. Gutmann is aware, this is not and unusual motion being made whether with him or any other prosecutor. Matter of fact, it's only recently, based on the fact that you end up often times with these all white juries and the defendants are very sensitive to that. Mr. Griffith, I think, is very sensitive to that and essentially wanted me to make this particular motion. I'm going to do it because I think I have to under case law and all I said, so the record is sufficient if it goes up on appeal, if we sit some blacks, there's not an issue, okay? And, we can forget about it. If we don't, all I ask is to have Mr. Gutmann state the reasons for the strike, if you seen them outside before, if you do, then it's not there in terms of appeal and I think case law says you've got to make a record on this issue.

THE COURT: What do you want me to do? Ask him on the record in front of the panel?

MR. SMITH: Judge, all we have to do is take a seat and wait until the jury is selected.

THE COURT: There's a couple of folks on that panel that you can't tell. Are you going to ask them?

MR. SMITH: Here's my suggestion, you seat 13, if there is some seated, then we don't have any problem, we forget about it. If there aren't, then you can go ahead and send for lunch and I don't have any problem with that at all. At that point, I'm not going to make my objection and ask Mr. Gutmann to state for the record why he struck who he struck.

THE COURT: It will taint their future service as jurors. Okay. Let's see if we've got any problems.

THE CLERK: I'm ready.

THE COURT: Okay, go ahead.

(WHEREUPON, the Clerk called 13 jurors to try this case and Court continued as follows:)

THE COURT: Okay. Get me the two strike sheets.

(WHEREUPON, the Court called the names of the people who had been struck and Court continued as follows:)

THE COURT: Okay. You folks are excused. We may see you during pendency of your terms. Thank you very much. I'm going to swear the Jury and then we'll

break for lunch.

(WHEREUPON, THE jury panel was placed under oath and recessed for lunch and the following motions were had out of the hearing of the jury:)

THE COURT: Okay. Let's go on the record. Okay, in view of Mr. Smith's comments, as I called the roll of the struck jurors, I find that the defense struck, Patricia Ballard, 146, white; Mary Miller, 186, white: Opal Moore, 34, white; Charles Mattingly, 168, white; Richard Dolan, 21, white; Roger Blackburn, 180, white; Richard Atkinson, 186, white; Oliva Williams, 177, black: Neal McWaters, 211, white. And that the Commonwealth struck: Robert Givens, 202, black: William Payne, 210, black: Glen Taylor, 53, white; a double strike for Mr. Atkinson, also by the Commonwealth, white; Gerry Young, 204, black; and another double strike, Olivia Williams, 137, black. What says the defendant now, sir?

MR. SMITH: Judge, we'll renew our motion and I'll state for the record...

THE COURT: Renew your motion for what, please, sir?

MR. SMITH: Well, specifically, we're moving that the Court discharge this panel and we start over again based on my client's rights to a fair cross section of the community. For the record, no black is seated, the defense struck one black person, the reasons are not only the victim but the defendant in the burglary in chief, as to their particular reasons, on the record, as to their striking of the five members of the race of the defendant and that's our motion.

THE COURT: Mr. Gutmann?

MR. GUTMANN: Your Honor, I would, at ...I would like the record to reflect that Mr. Smith did strike one black and 8 whites. I did not strike all the blacks from the jury. Is the Court requesting that I state on the record why I struck each person?

THE COURT: No, I'm not going to request that. Does the case law state that he has to state affirmatively why he struck as opposed to negatively that he struck not because of race?

MR. SMITH: I think he has to and if the Court wants to do this...

THE COURT: Do you want to show me the authority for that?

MR. SMITH: ...if the Court wants to do this, we can break for lunch and then I'll bring some case law.

THE COURT: Do you want to go with it right now and state your reasons right now?

MR. GUTMANN: Well, your Honor, you know, I don't feel that that's my obligation for the same reason that Mr. Smith is not required to state why he struck certain people. I mean, I struck a young while male for the same reason I struck a young black male...a young black female and that's because they're young and studies have shown that they are less law and order citizens. You know, I obviously don't want jurors in the same age category as Mr. Griffith, that's one of my primary considerations and I struck Mr. Atkinson due to his occupation, a liberal occupation being an art director.

THE COURT: Okay. Objection denied subject to case law. You may show me when we return.

MR. SMITH: Okay. I assume that this Court is not going to require our motion to be specific as to the blacks that were struck.

THE COURT: Not unless you have some case law. Court is adjourned.

(WHEREUPON, Court recessed for lunch and the following discussion was had before the jury returned to the court room:)

MR. SMITH: Is the Court going to rule on our motion?

THE COURT: Motion denied.

MR. SMITH: Is the Court overruling our motion...denying our motion for the Commonwealth to be specific as to the reasons the black members were struck from the panel?

THE COURT: Well, you said you had some authority.

MR. SMITH: Well, my moiton, irregardless, but, in fact, I will try to get some.

THE COURT: Motion denied, irregardless, subject to renewal if you have case law, okay?

MR. GUTMANN: Thank you.

MR. SMITH: Okay. Judge, for the record, I'll renew my prior motion for discharging this panel and starting over. I think my client's rights according to the Federal Constitution sixth and fourteenth amendments State Section 7 and 1 to a fair cross section of the community has been violated. There are three ...I have been able to obtain, the case of the People v. Hall, 1983, it's in the 34th criminal law reporter, 2259 and that's in 1984, where it says, People v. Wheeler which is 22 Cal3r,

263 and case it recites is 573, second 481968, and then there's a Massachusetts case Commonwealth versus S-o-a-r-e-s, 377 Mass 461, recites389 ne 2nd 499, 1979 case. It's a New Mexico case, C-r-e-s-p-in, 94 New Mexico, 486, and the rest of the cite 612, one Federal case MacCray, M-a-c C-r-a-y versus A-b-r-a-m-s, out of the eastern district of New York, 1983, 34 criminal law reporter, 2441984, preemptories cannot be exercised soley on the basis of race and as the Court knows, the defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury and the Court has to find out how the preemptories were exercised and the defense counsel does not have to state it because this is a different situation for the defendant.

THE COURT: Let me ask you something before you go on. Are you aware of the fact that the Commonwealth did not strike all blacks. There was at least one who was not chosen merely by randum selection of the Clerk?

MR. SMITH: I'm aware of that, your Honor. And, I'm aware that the Court was going to put that information into the record when we got back from lunch.

THE COURT: Okay.

MR. SMITH: I belive there were at least three, three out of six that were black and that left one and I don't think a token black situation can cure it. For the record, I'd ask the Court to discharge this jury or at least make Mr. Gutmann put in the record the specifics at least as to each one.

THE COURT: Okay. Both motions denied. Okay.

MR. GUTMANN: Thank you, Judge.

MR. SMITH: Thank you.

THE COURT: Okay, let's have the jury, sir.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and also completes the voir dire and motion portion of this transcript.)

STATE OF KENTUCKY

COUNTY OF JEFFERSON

I, SHARI WILLIAMS KATTUS, Official Court Reporter for the Jefferson Circuit Court, Division Nine, do hereby certify that the proceedings represent a true, correct and complete transcript of the voir dire and pre-trial motion portion of this trial.

WITNESS MY HAND THIS 6th day of January, 1985.

SHARI WILLIAMS KATTUS,
COURT REPORTER, NOTARY.

CASES CITED SINCE 1978

A. FOLLOWING SWAIN V. ALABAMA

1. Mitchell v. State, Ala.Cr.App., 450 So.2d 181 (1984)
2. State v. Wiley, Ariz., 698 P.2d 1244 (1985)
3. Blackwell v. State, Ga., 281 S.E.2d 599 (1981)
4. People v. Payne, 75 Ill. Dec. 643, 457 N.E.2d 1202 (1983)
5. Swope v. State, 263 Ind., 476, 325 N.2d 193 (1975)
   Hoskins v. State, Ind., 441 N.E.2d 419 (1982)
6. Commonwealth v. McFerron, Ky., 680 S.W.2d 924 (1984)
7. State v. James, La.Cr.App., 459 So.2d 1299 (1984)
   State v. Brown, La., 371 So.2d 751 (1979)
8. Lawrence v. State, Md.App., 444 A.2d 478 (1982)
9. State v. Hurley, Mo.App., 680 S.W.2d 209 (1984)
10. People v. McCray, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982)
    People v. Charles, 61 N.Y.2d 321, 473 N.Y.S.2d 941 (1984)
11. State v. Shelton, N.C.App., 281 S.E.2d 684 (1981)
12. Lee v. State, Okl.Cr., 637 P.2d 879 (1981)
13. State v. Raymond, R.I., 446 A.2d 743 (1982)
14. State v. Thompson, S.C., 281 S.E.2d 216 (1981)
15. State v. Wooden, Tenn.Cr.App., 658 S.W.2d (1983)

B. NO DETERMINATION MADE

16. Mallott v. State, Alas., 608 P.2d 737 (1980)
17. People v. Smith, Colo.App., 622 P.2d 90 (1980)
    People v. Siemien, Colo.App., 671 P.2d 1021 (1983)
18. Saunders v. State, Del.Supr., 401 A.2d 629 (1979)
19. Commonwealth v. Futch, Pa., 424 A.2d 1231 (1981)

C. NO RIGHT TO PARTICULAR JURY

20. Walton v. State, 279 Ark. 193, 650 S.W.2d 231 (1983)
21. Booker v. State, Miss., 449 So.2d 209 (1984)

D. FEDERAL CONSTITUTION NOT INVOLVED

22. Doepel v. United States, D.C. App., 434 A.2d 449 (1981)

E. NEW RULES

23. People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978)

24. Commonwealth v. Soares, 377 Mass. 461, 387 N.Ed.2d 499 (1979)

25. State v. Crespin, 94 N.M. 486, 612 P.2d 716 (1980)

26. State v. Neil, Fla., 457 So.2d 481 (1984)

27. State v. Gilmore, 19 N.J.Super. 389, 489 A.2d 1175 (1985)

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

VS. NOTICE OF APPEARANCE

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * * *

The Clerk will enter my appearance as counsel for Randall Lamont Griffith, who in this Court is the petitioner. I certify that I am a member of the Bar of the Supreme Court of the United States. The Clerk is requested to notify the undersigned of action by this Court by regular mail.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

PHONE (502) 564-5231

NO. _____

RANDALL LAMONT GRIFFITH — PETITIONER

VS.

MOTION FOR LEAVE TO
PROCEED IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

The Petitioner, Randall Lamont Griffith, asks leave to file the attached Petition For a Writ of Certiorari to the Supreme Court of Kentucky without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

The petitioner was permitted to proceed as an indigent by the Supreme Court of Kentucky. The petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
DEPARTMENT OF PUBLIC ADVOCACY
151 ELKHORN COURT
FRANKFORT, KENTUCKY 40601

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH, — PETITIONER

VS.

AFFIDAVIT IN SUPPORT OF MOTION
TO PROCEED ON APPEAL IN FORMA PAUPERIS

COMMONWEALTH OF KENTUCKY, — RESPONDENT.

* * * * *

I, Randall Lamont Griffith, being first duly sworn, depose and say that I am the Petitioner in the above-entitled case; that in support of my Motion to proceed on Appeal without being required to pre-pay fees, costs, or giving security therefor, I state that because of my poverty I am unable to pay the costs of said proceeding or to give security therefor; that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of prosecuting the Appeal are true.

1. Are you presently employed?

No. I was last employed at Dickerson & Harper Sanitation, Louisville, Kentucky, in 1982 where I earned approximately $644.00 per month.

2. Have you received within the past 12 months any income from a business, profession, or other form of self-employment, or in the form of rent payments, interests, dividends, or other source?

No.

3. Do you own any cash or checking or savings accounts?

No.

4. Do you own any real estate, stocks, bonds, notes, automobiles or other valuable property (excluding ordinary household furnishings and clothing)?

No.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

No one.

I understand that a false statement or answer to any questions in this Affidavit will subject me to penalties for perjury.

Randall L. Griffith
RANDALL LAMONT GRIFFITH

SUBSCRIBED AND SWORN to before me by Randall Lamont Griffith on this the 5th day of August, 1985.

Lynn A. Murphy (Aldridge)
NOTARY PUBLIC, KY. STATE-AT-LARGE
My Commmission expires: 12-4-85

NO.

RANDALL LAMONT GRIFFITH PETITIONER

VS. CERTIFICATE OF SERVICE

COMMONWEALTH OF KENTUCKY RESPONDENT

* * * * * * * * *

I, Larry H. Marshall, counsel for petitioner, hereby certify that the attached Petition For Writ of Certiorari, Appendix, Notice of Appearance, and Motion For Leave to Proceed In Forma Pauperis were served on respondent by hand-delivering copies of the aforementioned documents, on August 9, 1985, to respondent's counsel, David L. Armstrong, Attorney General, Capitol Building, Frankfort, Kentucky 40601.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR PETITIONER

NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH — PETITIONER

VS. — AFFIDAVIT PURSUANT TO SUPREME COURT RULE 28(2)

COMMONWEALTH OF KENTUCKY — RESPONDENT

* * * * * * * * *

I, Larry H. Marshall, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for petitioner in the above-styled action.

3. The attached Petition for Writ of Certiorari, Appendix, Notice of Appearance, Motion For Leave To Proceed In Forma Pauperis, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Alexander L. Stevas, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543.

5. To my knowledge, the mailing of the aforementioned documents took place on August 9, 1985, which is within 60 days of the June 13, 1985, date that the Supreme Court of Kentucky affirmed petitioner's conviction.

Larry H. Marshall
LARRY H. MARSHALL
ASSISTANT PUBLIC ADVOCATE
MEMBER, BAR OF THE SUPREME
COURT OF THE UNITED STATES

COUNSEL FOR PETITIONER

Subscribed and sworn to before me by Larry H. Marshall, this 9th day of August, 1985.

Elaine Lee Simpson
Notary Public, State at Large

My Commission expires: July 21, 1987

ORIGINAL

NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH — PETITIONER

V.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

COMMONWEALTH OF KENTUCKY — RESPONDENT

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DAVID L. ARMSTRONG
ATTORNEY GENERAL

DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600
COUNSEL FOR RESPONDENT

September 11th, 1985

RESPONDENT'S BRIEF IN OPPOSITION
TO PETITION FOR CERTIORARI

The respondent, Commonwealth of Kentucky, by counsel, hereby requests this Court to deny the petition for certiorari seeking review of an opinion of the Supreme Court of Kentucky for the following reasons.

REASONS WHY THE WRIT SHOULD BE DENIED

This Court granted certiorari in a rather similar case, Batson v. Kentucky, No. 84-6263, on April 22, 1985. The granting of certiorari in Batson appears to indicate a willingness to reconsider the questions relating to peremptory challenges addressed in Swain v. Alabama, 380 U.S 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). Certiorari should be denied in the case at bar since the Batson case will provide an adequate vehicle to consider questions relating to allegedly discriminatory exercise of peremptory challenges.

Furthermore, the factual differences between the case at bar and Batson demonstrate that the petitioner would not be entitled to a new trial even if this Court adopted an extreme remedy to prevent discriminatory exercise of peremptory challenges such as the remedy set out in People v. Wheeler, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

While the prosecutor in the case at bar, Mr. Gutman, who also was the prosecutor in Batson, exercised four (4) of his six allotted peremptory challenges against blacks in this case, as he did in Batson, other factors distinguish this case from Batson. In Kentucky, both sides exercise peremptory challenges in secret simultaneously at the conclusion of voir dire. RCr 9.36. After both sides exercised peremptory challenges in the case at bar, at least one black prospective juror remained. The remaining black juror was eliminated by random selection of the clerk in reducing the jury to the required size. (Petitioner's Appendix, p. A-11.) Thus, unlike Batson, the prosecutor's strikes alone did not cause an all-white jury to hear the case against a black defendant. As a matter of fact, one of the four blacks stricken by the prosecutor, Olivia Williams, was also stricken by the petitioner.

The case at bar is also distinguishable from Batson by the fact that the prosecutor in the case at bar denied any discriminatory motive in exercising peremptory challenges and even explained his reasons for exercising most of his peremptory challenges. He stated that although he was under no obligation to explain his peremptory challenges, he struck a young black man and young black woman because of their age. The prosecutor believed young people were less law and order oriented and were also in petitioner's age bracket, as he was twenty three years old at the time. He struck a white male for the same reason, and struck another white male based on his occupation. (Petitioner's Appendix, p. A-9.) It is not likely that Olivia Williams was the young black woman the prosecutor referred to, as Olivia Williams had a younger brother who had been arrested for bad checks eight years previously. (Transcript of Evidence, p. 17.) Both sides viewed Ms. Williams as an undesirable juror. In addition to such explanations of the prosecutor's motives for his peremptory challenges, Mr. Gutman categorically denied any racial motive and the trial judge apparently believed him.

(Petitioner's Appendix, p. A-6.) The prosecutor apparently viewed the mere questioning of his motives to be a personal affront. (Id., p. A-5.)

Thus, it appears that only two of the prosecutor's six peremptory challenges went unexplained, and one of those strikes was a double strike against a black woman whose brother had an arrest record. Petitioner cannot even show a statistically suspicious exercise of peremptory challenges based on the two unexplained strikes. The prosecutor's credibility with the trial judge and his explanation of some of his strikes would satisfy the most radical standards proposed to prohibit racially motivated use of peremptory challenges. See, People v. Wheeler, 148 Cal.Rptr. 899, 583 P.2d 748, 765 (1970). Accordingly, petitioner cannot ultimately prevail even if this Court accepts the arguments advanced by the critics of Swain v. Alabama, supra. Accordingly, certiorari should be denied.

Respectfully submitted,

DAVID L. ARMSTRONG
ATTORNEY GENERAL

David K. Martin

DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
CAPITOL BUILDING
FRANKFORT, KY 40601-3494

COUNSEL FOR RESPONDENT

NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH PETITIONER

V.

COMMONWEALTH OF KENTUCKY RESPONDENT

CERTIFICATE OF SERVICE

I, David K. Martin, counsel for respondent, hereby certify that the attached Respondent's Brief in Opposition to Petition for Certiorari was served on petitioner by hand-delivering, Messenger Mail, two copies to Hon. Larry H. Marshall, Assistant Public Advocate, Counsel for Petitioner, and Hon. Joanne M. Yanish, Assistant Public Advocate, Of Counsel, 151 Elkhorn Court, Frankfort, KY 40601, this 11th day of September, 1985.

David K. Martin

DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
MEMBER, BAR OF THE SUPREME COURT
OF THE UNITED STATES

COUNSEL FOR RESPONDENT

NO. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH PETITIONER

V.

AFFIDAVIT PURSUANT TO
SUPREME COURT RULE 28(2)

COMMONWEALTH OF KENTUCKY RESPONDENT

I, David K. Martin, being first duly sworn according to law, depose and say:

1. I am a member of the Bar of the Supreme Court of the United States.

2. I am counsel for respondent in the above-styled action.

3. The attached Respondent's Brief in Opposition to Petition for Certiorari, Notice of Appearance, and Certificate of Service were deposited in a United States Post Office on High Street, Frankfort, Kentucky 40601.

4. The aforementioned documents were deposited in the United States Post Office, with first-class postage prepaid, and properly addressed to Mr. Joseph F. Spaniol, Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, on September 11, 1985, thirty days after receipt of the petition by the respondent.

David K. Martin

DAVID K. MARTIN
ASSISTANT ATTORNEY GENERAL
MEMBER, BAR OF THE SUPREME COURT
OF THE UNITED STATES

COUNSEL FOR RESPONDENT

Subscribed and sworn to before me by David K. Martin, this 11th day of September, 1985.

Joseph F. Johnson

Notary Public, State at Large

My Commission expires: March 1, 1987

No. 85-5221 (1)

In the Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL LAMONT GRIFFITH, PETITIONER

v.

COMMONWEALTH OF KENTUCKY, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

JOINT APPENDIX

LARRY H. MARSHALL *
Assistant Public Advocate
JOANNE M. YANISH
Assistant Public Advocate
151 Elkhorn Court
Frankfort, Kentucky 40601
(502) 564-5230
Counsel for Petitioner

DAVID C. ARMSTRONG
Attorney General
DAVID MARTIN *
Assistant Attorney General
Capitol Building
Frankfort, Kentucky 40601
(502) 564-7600
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED AUGUST 9, 1985
CERTIORARI GRANTED JUNE 2, 1986

INDEX

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

DATE	DOCKET ITEM
September 27, 1982	Defendant Randall Lamont Griffith was indicted in Jefferson Circuit Court for first-degree robbery, theft by unlawful taking of the value of less than $100 and persistent felony offender in the second degree.
May 15, 1984	The jury was selected after each side exercised their peremptory challenges.
May 21, 1984	Defendant Randall Lamont Griffith was convicted in Jefferson Circuit Court of robbery in the first degree and second degree persistent felony offender; defendant Griffith was sentenced to twenty years of imprisonment.
May 24, 1984	Notice of Appeal filed in Jefferson Circuit Court by defendant.
June 13, 1985	Kentucky Supreme Court affirmed defendant's conviction.

THE COMMONWEALTH OF KENTUCKY
JEFFERSON CIRCUIT COURT
CRIMINAL DIVISION

September Term A. D., 1982

82CR1449-9

THE COMMONWEALTH OF KENTUCKY

Against

RANDALL LAMONT GRIFFITH
315 Poplar Level Road

ROBBERY I
KRS 515.020 Class B Felony
10 to 20 years

THEFT BY UNLAWFUL TAKING UNDER $100
KRS 514.030 Class A Misdemeanor
Up to 12 months &/or Up to $500

PERSISTENT FELONY OFFENDER II
KRS 532.080 Indeterminate

[INDICTMENT]

The Grand Jurors of the County of Jefferson, in the name and by the authority of the Commonwealth of Kentucky, charge:

COUNT ONE

That on or about the 8th day of September, 1982, in Jefferson County, Kentucky, the above named defendant, Randall Lamont Griffith, committed first-degree robbery by threatening the use of physical force upon Ms. Collette

Ruhl, while armed with a ice pick, a dangerous weapon, and in the course of committing a theft at 5057 Poplar Level Road.

COUNT TWO

That on or about the 8th day of September, 1982, in Jefferson County, Kentucky, the above named defendant, Randall Lamont Griffith, committed theft by unlawfully taking or exercising control over a purse, of the value of less than $100, belonging to Ms. Deborah K. Barnett, with the intent to deprive her thereof.

COUNT THREE

Further, the Defendant, Randall Lamont Griffith, who is more than twenty-one years of age, has previously been convicted for the following prior felony and is now charged as being a Persistent Felony Offender in the Second-Degree as follows:

(1) That on or about the 1st day of July, 1980, in Jefferson County, Kentucky, the above named defendant, Randall Lamont Griffith, appeared in the Jefferson Circuit Court, Jefferson County, Kentucky, a court of general criminal jurisdiction, pursuant to Indictment No. 80CR0272, charging him with Receiving Stolen Property Over $100, a felony, in violation of the Kentucky Revised Statutes; and said court convicted and sentenced the defendant, Randall Lamont Griffith, to two years withheld for five years.

AGAINST THE PEACE AND DIGNITY OF THE COMMONWEALTH OF KENTUCKY.

A TRUE BILL

/s/ Henry L. Masterson
FOREPERSON

Det. D. Crady, 6122, JCPD.

JEFFERSON CIRCUIT COURT
NINTH DIVISION

5-15-84

82CR1449

COM'L.—JOE GUTMANN

vs

RANDALL L. GRIFFITH—LEO SMITH

[JUROR LIST]

Jurors

1. Douglas Edwards #106
2. Steven Nelson #68
3. Gloria Smithson #169
4. Thomas Hanks #111
5. Patricia Freeman #75
6. Rhonda Engler #28
7. Marvin Sparks #110 excused
8. Douglas Heil #158
9. Peggy Smith #137
10. John Stiles #117
11. Otto Harrison #151
12. Robert Kaufman #77
13. Thurston Sullivan #191

82CR1449 — 5/15/84

COMMONWEALTH OF KENTUCKY
COUNSEL FOR COMMONWEALTH Joe Gutmann

DEFENDANT(S) Randall LaMont Griffith

COUNSEL FOR DEFENDANT(S) Leo Smith

JEFFERSON CIRCUIT COURT
NINTH DIVISION

[JUROR STRIKE LIST]

NAMES OF JURORS IMPANELED	STRICKEN BY WHOM	BOX OF JUROR
1. ~~Thomas Cook #48~~ Carol Douglas Edwards #106		1
2. Steven Nelson #168		2
3. ~~Patricia Bullard #146~~	Dft	X
4. ~~Mary Mullen #86~~	Com'l	X
5. ~~Opal Moore #34~~	Com'l	X
6. ~~Robert Owens #202~~	Com'l	X
7. Gloria Smithson #169		3
8. Thomas Banks #111		4
9. Patricia Freeman #75		5
10. Rhonda Engler #28		6
11. Marvin Sparks #110		7
12. Douglas Heil #158		8
13. ~~Charles Mattingly #168~~	Dft	X
14. ~~William Powell #210~~	Com'l	X
15. ~~Richard Adams #21~~	Dft	X
16. Peggy Smith #137		9
17. ~~Robert Claxton #160~~	Dft	X
18. John Stiles #117		10
19. ~~Glenn Taylor #53~~	Com'l	X
20. Otto Harrydon #151		11
21. ~~Richard Atchison #86~~	Com'l Dft	X
22. Robert Kaufman #77		12
23. Thurston Sullivan #191		13
24. Horace Wise #190		
25. ~~Gerri Young #204~~	Com'l	X
26. Phill Robinson Jr. #18		
27. ~~Alexia Williams #77~~	Com'l Dft	X
28. ~~Nell McEntire #211~~	Dft	X
29.		
30.		
31.		
32.		
33.		

JEFFERSON CIRCUIT COURT
NINTH DIVISION

JUDGE KEN G. COREY

No. 82CR1449

COMMONWEATH OF KENTUCKY, PLAINTIFF

vs

RANDALL LAMONT GRIFFITH, DEFENDANT

JUDGMENT AFTER JURY TRIAL

The defendant at arraignment having entered a plea of not guilty to the following charges included within the indictment, Count 1, Robbery I, Count 2, T.B.U.T. U/100.00, dismissed; Count 3, P.F.O. II and having on the 15th day of May, 1984, appeared in open court with his attorney Honorable Leo Smith, the case was tried before a jury which returned the following verdict: *VERDICTS UNDER INSTRUCTION NO. 1, ROBBERY IN THE FIRST DEGREE*: WE, THE JURY, FIND THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, AND FIX HIS PUNISHMENT AT CONFINEMENT IN THE PENITENTIARY FOR TEN YEARS. /S/ STEVEN L. NEILSON, FOREPERSON.

After the jury returned their verdict of guilt, the second phase of the trial began; the defendant being charged as a P.F.O. II. Evidence was heard and the jury returned the following verdict: *VERDICTS UNDER INSTRUCTION NO. 1 PERSISTENT FELONY OFFENDER IN THE SECOND DEGREE:* WE, THE JURY, FIND

THE DEFENDANT, RANDALL LAMONT GRIFFITH, GUILTY UNDER INSTRUCTION NO. 1, and fix his punishment at confinement in the penitentiary for Twenty Years, *in lieu of* our previous recommendation. /S/ STEVEN L. NELSON, FOREPERSON.

Pursuant to KRS. 532.052, the court, having explained the defendant's right to a presentence investigation report, the defendant, in person and by counsel, expressly waived such right and requested that the Court proceed with sentencing immediately.

No sufficient cause having been shown why judgment should not be pronounced, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT that the defendant is guilty of the following charges: COUNT 1, ROBBERY I, COUNT 3, P.F.O. II and is Sentenced to 10 Years on Count 1, enhanced to 20 Years on Count 3, for a total of 20 years in Bureau of Corrections.

IT IS FURTHER ORDERED that the defendant shall not be entitled to bail and that the sheriff of Jefferson County deliver the defendant to the custody of the Department of Corrections at such location within this Commonwealth as the Department shall designate.

IT IS FURTHER ORDERED THAT the defendant is hereby credited with time spent in custody prior to sentence, namely as many days as certified by the jailer of Jefferson County towards service of the maximum term of imprisonment.

/s/ Judge Ken G. Corey
JUDGE KEN G. COREY

ATTESTED: A TRUE COPY

PAULIE MILLER, Clerk

By /s/ Debbie Moore D.C.

CC: LEO SMITH
JOE GUTMANN

[ENTERED IN COURT May 21, 1984]

JEFFERSON CIRCUIT COURT
NINTH DIVISION

No. 82CR1449

COMMONWEATH OF KENTUCKY, PLAINTIFF

v.

RANDALL LAMONT GRIFFITH, DEFENDANT

NOTICE OF APPEAL

Comes the appellant, Randall Lamont Griffith, by counsel, pursuant to RCr 12.04, and hereby gives notice to the Commonwealth of Kentucky, the appellee, of his intention to take an appeal to the Kentucky Supreme Court from the final judgment entered herein.

CERTIFICATE

This is to certify that a copy of the foregoing was delivered to Hon. Joseph Gutmann, Assistant Commonwealth's Attorney, or his agent, on May 24, 1984.

/s/ Frank W. Heft, Jr.
FRANK W. HEFT, JR.
Chief Appellate Defend[illegible] of the
Jefferson District Public Defender
200 Civic Plaza
719 West Jefferson Street
Louisville, Kentucky 40202
(502) 587-3800
Counsel for Defendant

JEFFERSON CIRCUIT COURT
NINTH DIVISION

[EXCERPTS FROM TRANSCRIPT OF VOIR DIRE MAY 15, 1984]

• • • •

[35] MR. SMITH: Judge, approach the bench while we're waiting on that, I think it will same some time, in order to save some time, I'll go ahead and bring this up now.

(WHEREUPON, the following discussion was had at the bench out of the hearing of the Jury:)

MR. SMITH: I have no idea what, in terms of race, the jury is going to consist of. If, by chance, we got an all white jury, I'm going to as that the Court, before discharging the rest, put on the record as to whether or not Mr. Gutmann exercised his strikes as to whether or not the person was black and if so, I think case law gives me the right to have him state for the record the reasons and I'll bring that up now so I don't have to run up after the jury is selected.

MR. GUTMANN: Mr. Smith, I consider that very offensive.

MR. SMITH: Well, needless to say. . .

MR. GUTMANN: Judge, I want to take exception to that.

THE COURT: Okay.

MR. SMITH: I have no choice but to make [36] to make that objection.

THE COURT: Just tell me now, did you strike any member of the panel because of their race

MR. GUTMANN: No, I did not.

THE COURT: Okay. That's sufficient.

MR. SMITH: All I ask, we can wait and if we end up impaneling some blacks, there will be no issue. I have no idea, I simply ask for purposes of the record because it does not indicate race as to how many strikes that we simply list that, does that make sense?

THE COURT: No.

MR. GUTMANN: Mr. Smith, did you strike any whites because they are white?

MR. SMITH: As Mr. Gutmann is aware, this is not and unusual motion being made whether with him or any other prosecutor. Matter of fact, it's only recently, based on the fact that you end up often times with these all white juries and the defendants are very sensitive to that. Mr. Griffith, I think, is very sensitive to that and essentially wanted me to make this particular motion. I'm going to do it because I think I have to under case law and all I said, so the record is sufficient if it goes up on appeal, if we sit some blacks, there's not an issue, okay? And, we can forget about it. If we don't, all I ask is to have Mr. Gutmann state the reasons for the strike, if you seen them outside before, if you do, then it's not there in terms of appeal and I think case law says you've got to make a record on this issue.

[37] THE COURT: What do you want me to do? Ask him on the record in front of the panel?

MR. SMITH: Judge, all we have to do is take a seat and wait until the jury is selected.

THE COURT: There's a couple of folks on that panel that you can't tell. Are you going to ask them?

MR. SMITH: Here's my suggestion, you seat 13, if there is some seated, then we don't have any problem, we forget about it. If there aren't, then you can go ahead and send for lunch and I don't have any problem with that at all. At that point, I'm not going to make my objection and ask Mr. Gutmann to state for the record why he struck who he struck.

THE COURT: It will taint their future service as jurors. Okay. Let's see if we've got any problems.

THE CLERK: I'm ready.

THE COURT: Okay, go ahead.

(WHEREUPON, the Clerk called 13 jurors to try this case and Court continued as follows:)

THE COURT: Okay. Get me the two strike sheets.

(WHEREUPON, the Court called the names of the people who had been struck and Court continued as follows:)

THE COURT: Okay. You folks are excused. We may see you during pendency of your terms. Thank you very much. I'm going to swear the Jury and then we'll [38] break for lunch.

(WHEREUPON, THE jury panel was placed under oath and recessed for lunch and the following motions were had out of the hearing of the jury:)

THE COURT: Okay. Let's go on the record. Okay, in view of Mr. Smith's comments, as I called the roll of the struck jurors, I find that the defense struck, Patricia Ballard, 146, white; Mary Miller, 186, white; Opal Moore, 34, white; Charles Mattingly, 168, white; Richard Dolan, 21, white; Roger Blackburn, 180, white; Richard Atkinson, 86, white; Oliva Williams, 177, black; Neal McWaters, 211, white. And that the Commonwealth struck: Robert

Givens, 202, black; William Payne, 210, black; Glen Taylor, 53, white; a double strike for Mr. Atkinson, also by the Commonwealth, white; Gerry Young, 204, black; and another double strike, Olivia Williams, 137, black. What says the defendant now, sir?

MR. SMITH: Judge, we'll renew our motion and I'll state for the record. . .

THE COURT: Renew your motion for what, please, sir?

MR. SMITH: Well, specifically, we're moving that the Court discharge this panel and we start over again based on my client's rights to a fair cross section of the community. For the record, no black is seated, the defense struck one black person, the reasons are not only the victim but the defendant in the burglary in chief, as to their particular reasons, on the record, as to their striking of the five members of the race of the defendant and that's our motion.

THE COURT: Mr. Gutmann?

[39] MR. GUTMANN: Your Honor, I would, at . . . I would like the record to reflect that Mr. Smith did strike one black and 8 whites. I did not strike all the blacks from the jury. Is the Court requesting that I state on the record why I struck each person?

THE COURT: No, I'm not going to request that. Does the case law state that he has to state affirmatively why he struck as opposed to negatively that he struck not because of race?

MR. SMITH: I think he has to and if the Court wants to do this. . .

THE COURT: Do you want to show me the authority for that?

MR. SMITH: . . . if the Court wants to do this, we can break for lunch and then I'll bring some case law.

THE COURT: Do you want to go with it right now and state your reasons right now?

MR. GUTMANN: Well, your Honor, you know, I don't feel that that's my obligation for the same reason that Mr. Smith is not required to state why he struck certain people. I mean, I struck a young while male for the same reason I struck a young black male . . . a young black female and that's because they're young and studies have shown that they are less law and order citizens. You know, I obviously don't want jurors in the same age category as Mr. Griffith, that's one of my primary considerations and I struck Mr. Atkinson due to his occupation, a liberal occupation being an art director.

THE COURT: Okay. Objection denied subject to case law. You may show me when we return.

[40] MR. SMITH: Okay. I assume that this Court is not going to require our motion to be specific as to the blacks that were struck.

THE COURT: Not unless you have some case law. Court is adjourned.

(WHEREUPON, Court recessed for lunch and the following discussion was had before the jury returned to the court room:)

MR. SMITH: Is the Court going to rule on our motion?

THE COURT: Motion denied.

MR. SMITH: Is the Court overruling our motion . . . denying our motion for the Commonwealth to be specific as to the reasons the black members were struck from the panel?

THE COURT: Well, you said you had some authority.

MR. SMITH: Well, my moiton, irregardless, but, in fact, I will try to get some.

THE COURT: Motion denied, irregardless, subject to renewal if you have case law, okay?

MR. GUTMANN: Thank you.

MR. SMITH: Okay. Judge, for the record, I'll renew my prior motion for discharging this panel and starting over. I think my client's rights according to the Federal Constitution sixth and fourteenth amendments state Section 7 and 1 to a fair cross section of the community has been violated. There are three . . . I have been able to obtain, the case of the People v. Hall, 1983, it's in the 34th criminal law reporter, 2259 and that's in 1984, where it says, People v. Wheeler which is 22 Cal3r, [41] 263 and case it recites is 573, second 481968, and then there's a Massachusetts case Commonwealth versus S-o-a-r-e-s, 377 Mass 461, recites 389 ne 2nd 499, 1979 case. It's a New Mexico case, C-r-e-s-p-in, 94 New Mexico, 486, and the rest of the cite 612, one Federal case MacCray, M-a-c C-r-a-y versus A-b-r-a-m-s, out of the eastern district of New York, 1983, 34 criminal law reporter, 2441984, preemptories cannot be exercised solely on the basis of race and as the Court knows, the defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury and the Court has to find out how the preemptories were exercised and the defense counsel does not have to state it because this is a different situation for the defendant.

THE COURT: Let me ask you something before you go on. Are you aware of the fact that the Commonwealth did not strike all blacks. There was at least one who was not chosen merely by randum selection of the Clerk?

MR. SMITH: I'm aware of that, your Honor. And, I'm aware that the Court was going to put that

information into the record when we got back from lunch.

THE COURT: Okay.

MR. SMITH: I believe there were at least three, three out of six that were black and that left one and I don't think a token black situation can cure it. For the record, I'd ask the Court to discharge this jury or at least make Mr. Gutmann put in the record the specifics at least as to each one.

[42] THE COURT: Okay. Both motions denied. Okay.

MR. GUTMANN: Thank you, Judge.

MR. SMITH: Thank you.

THE COURT: Okay, let's have the jury, sir.

(WHEREUPON, that concludes the discussion at the bench out of the hearing of the Jury and also completes the voir dire and motion portion of this transcript.)

Rendered: June 13, 1985

SUPREME COURT OF KENTUCKY

84-SC-1001-MR

RANDALL LAMONT GRIFFITH, APPELLANT

v.

COMMONWEALTH OF KENTUCKY, APPELLEE

Appeal from Jefferson Circuit Court
Honorable Ken G. Corey, Judge
82-CR-1449

MEMORANDUM OPINION OF THE COURT AFFIRMING

Randall Lamont Griffith was convicted of first-degree robbery and as a second-degree persistent felony offender. He was sentenced to a term of twenty years' imprisonment. We affirm.

Griffith asserts that the commonwealth improperly struck blacks from the jury that tried him. The Commonwealth peremptorily excused four blacks and two whites. One black was excused by random selection by the clerk.

Griffith, a black, insists the Commonwealth must explain why peremptories were exercised against blacks. The Commonwealth's attorney denied race as a reason for striking, and the trial court declined to discharge the jury. *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.

2d 759 (1965), held that the striking of all blacks from a jury panel in a particular case is not a denial of equal protection. We are of the opinion *Swain* disposes of this issue, and we decline to go further than the *Swain* court.

Griffith next asserts that the trial court erroneously permitted witnesses for the prosecution to testify as to their identification of Griffith and in permitting police officer witnesses to also testify as to the witnesses' identification of Griffith. We have examined the authorities cited and conclude this testimony was not erroneously admitted.

The judgment is affirmed.

All concur.

SUPREME COURT OF THE UNITED STATES

No. 85-5221

RANDALL LAMONT GRIFFITH, PETITIONER

v.

KENTUCKY

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KENTUCKY

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted limited to the following question: In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, 476 U.S. —— (1986), be given retroactive effect? The case is set for oral argument in tandem with case No. 85-5221, *Griffith* v. *Kentucky*.

June 2, 1986

No. 85-5221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL LAMONT GRIFFITH,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

On Writ Of Certiorari To The Supreme Court of Kentucky

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the holding of *Batson* v. *Kentucky* applies to petitioner Griffifth's conviction which was not yet final at the time *Batson* was decided.

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OPINIONS BELOW

The Supreme Court of Kentucky affirmed the Judgment entered against petitioner in an unpublished opinion rendered on June 13, 1985 (Appendix, hereafter A 17). No written opinion was filed with the circuit court judgment of conviction entered on May 21, 1984.

GROUNDS OF JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 USC § 1257(3). The Supreme Court of Kentucky affirmed petitioner's conviction in an unpublished opinion rendered on June 13, 1985. The Petition for Writ of Certiorari was filed on August 9, 1985, within the time set by Rule 20.1 of the Rules of the Supreme Court. The Pettion for Writ of Certiorari was granted on June, 2 1986.

CONSTITUTIONAL PROVISION INVOLVED

Fourteenth Amendment, Section One

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Randall Lamont Griffith, was indicted on September 27, 1982, for the offenses of first degree robbery, theft by unlawful taking, and persistent felony offender in the second degree in violation of Kentucky Revised Statutes (KRS) 515.020, KRS 514.030, and KRS

532.080, respectively (Transcript of Record, hereafter TR 1; A2-3). The indictment charged that petitioner had committed robbery by "threatening the use of physical force upon Ms. Collett Ruhl while armed with an ice pick, a dangerous weapon" on or about September 8, 1982 (TR 1; A2). The object of the theft was a purse belonging to Deborah Barnett, a companion of Ms. Ruhl (later called Weist). (Transcript of Evidence, Volume I, hereafter TE I 37, 44-45).

In support of the robbery charge, the prosecution introduced Collett Weist who testified that on September 8, 1982, she and Deborah Barnett stopped on Poplar Level Road near the Magic Mart in Louisville, Kentucky to use the telephone at the phone booth (TE I 36-65). Ms. Barnett asked Ms. Wiest to bring her purse from the car, which she did (TE I 43). Ms. Barnett got her cigarettes from her purse and tossed the purse to the hood of the car where Ms. Wiest was sitting (*Id.*). While Ms. Wiest was sitting on the hood of the car, a black male between 5'5" and 5'7" and 150 pounds, with a short afro, walked up to Ms. Barnett, put his hand on the purse, held a knife up to Ms. Wiest, and picked up the purse (TE I 44-45). He then put the purse under his arm and walked back to the apartment behind him (TE I 46). Ms. Barnett testified similarly. Both women identified petitioner from a photopack.

Stephanie Kittrell testified she was on her way to the store when she saw a man draw a knife and grab a lady's purse (TE II 134). She made an in-court identification of petitioner (TE II 136).

Based on the evidence, the jury returned a verdict of guilty on the charge of first degree robbery and recommended a punishment of ten (10) years, a minimum sen-

tence (TE II 247-248). The punishment was enhanced by the jury, pursuant to Kentucky's Persistent Felon statute, to a total of twenty (20) years (TR 137-138; A 7-8).

Concerning the error complained of here, a jury panel was presented for examination and, in accordance with Kentucky practice, each party was allowed to exercise peremptory challenges. [Kentucky Rules of Criminal Procedure (RCr) 9.36(2),(3)]. (TR 94-96). Under the rules of court in Kentucky, the prosecutor was allowed five peremptory challenges and one extra peremptory due to the calling of extra jurors for examination. RCr 9.40(1), (2). The prosecutor used his peremptory challenges to strike four black jurors (Supplemental Transcript of Evidence, hereafter STE 38; A12-13).[1] Following the prosecutor's strikes, one black juror remained (STE 41; A15). However, after random selection by the Clerk pursuant to Kentucky's rules of court, RCr 9.36, no blacks remained on the panel (STE 41; A 15). As defense counsel, Leo Smith, argued, the result was that:

> . . . [The] defendant in this case is black and the two alleged victims are white, they are not black. There are no blacks sitting on this jury . . . (STE 41; A 15).

Defense counsel moved the trial court to require the prosecutor, Joseph Guttman,[2] to state his reasons for exercising his peremptories for the record (STE 35, 36, 40, 41; A 10, 11, 14, 15). Mr. Smith also moved for discharge of the panel on the basis of a violation of his client's constitutional right to a jury made up of a fair cross section of the community (STE 38, 40; A 13, 15). Both

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[1] One of those four black panel members had also been struck by the defense (STE 38; TR 94).

[2] Mr. Gutmann is the same Assistant Commonwealth Attorney who prosecuted the case of *Batson* v. *Kentucky*.

defense motions were overruled (STE 40, 42; A 14, 16). The jury was then sworn for service on Mr. Griffith's case (TE I 35).

A timely appeal was taken as a matter of right to the Supreme Court of Kentucky (TR 142; A 8). In an unpublished opinion rendered on June 13, 1985, the Supreme Court of Kentucky rejected petitioner's argument, based on both the Sixth Amendment and equal protection grounds, and held that "*Swain* disposes of this issue and we decline to go further than the *Swain* Court" (A 18). The judgment of the circuit court was affirmed (*Id.*).

On August 9, 1985, petitioner filed his petition for writ of certiorari. *Batson* v. *Kentucky* was decided by this Court on April 30, 1986. Petitioner's writ was granted on June 2, 1986, on the following question:

> "In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky*, ___ U.S. ___, 106 S.Ct. 1712, 89 L.Ed.2d ___ (1986), be given retroactive effect?" *Griffith* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 2274, 2275 (1986).

This Court set petitioner's case for oral argument in tandem with *Brown* v. *United States*, 476 U.S. ___, 106 S.Ct. 2275 (1986). *Griffith*, *supra*.

SUMMARY OF ARGUMENT

This case presents the question left unanswered by the recent decision of *Allen* v. *Hardy*, 476 U.S. ___, 54 U.S.L.W. 3856 (1986). Petitioner Griffith's conviction was on direct appeal to this Court on a petition for writ of certiorari when this Court announced the decision in *Batson* v. *Kentucky*, 476 U.S. ___, 106 S.Ct. 1712 (1986). *Allen* held that *Batson* is not to be applied retroactively to

cases on collateral review. Petitioner submits that for the reasons discussed herein, limited retrospective application is mandated.

First, since petitioner's case was pending on direct appeal at the time *Batson* was decided, petitioner should be afforded the benefit of the *Batson* rule without regard to the *Stovall* criteria or to whether *Batson* constituted a "clear break" in the law. Such a ruling would: a) allow this Court to avoid being in position of a super-legislature; b) would comply with the constitutional norm of principled decision-making; c) would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case and d) would further the goal of treating similarly situated defendants similarly.

Second, *Batson* constituted no "clear break" in the law since *Batson* announced no new constitutional principle of law. Rather, *Batson* reaffirmed the principle in *Swain* v. *Alabama*, 380 U.S. 202, 203-204 (1965), that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."

Batson departed from *Swain* only on the question of the standard of proof required of a defendant to establish purposeful discrimination by the prosecution in its exercise of peremptory challenges against minority persons. However, in adopting its evidentiary standard, *Batson* merely applied the established principles of post-*Swain* cases on proof of purposeful discrimination in a particular case to a new set of facts, that is, use of peremptory challenges in choosing a jury.

Batson did not disapprove any practice this Court had arguably sanctioned by prior cases. This Court had specifically disapproved of the use of peremptory challenges

on the basis of race in *Swain* as well as cases predating and post-dating *Swain*.

An analysis of the *Stovall* criteria in petitioner's case supports limited retrospectivity to cases not yet final. First, because the integrity of the truth-finding process is significantly enhanced by the holding of *Batson*, limited retroactivity is mandated. Second, reliance is not an appropriate consideration with respect to the *Batson* holding since any reliance by prosecutors cannot have been justified. *Swain* did not countenance striking jurors on the basis of race. Any reliance on *Swain* by prosecutors striking jurors on the basis of race was not justifiable. Moreover, due to an abundance of criticism of the evidentiary standard of *Swain*, the *Batson* holding concerning standard of proof was foreseeable.

Finally, the effect on the administration of criminal justice of a retrospective application of *Batson* to cases pending on direct appeal would be minimal. The number of cases on direct review pales in comparison with those on collateral review. Moreover many state and federal jurisdictions had already adopted alternative standards, reducing the number of cases affected by *Batson* further. The burden on prosecutors will also be minimal since *Swain* obligated prosecutors to keep information on stricken jurors in order to meet a challenge under *Swain*.

All factors considered, this Court should hold that *Batson* applies to convictions that were not yet final when *Batson* was decided.

ARGUMENT

THE UNITED STATES SUPREME COURT'S DECISION IN *BATSON* V. *KENTUCKY*, 476 U.S. ____, 106 S.Ct. 1712 (1986), SHOULD BE APPLIED RETROACTIVELY TO PETITIONER'S CASE WHICH WAS NOT YET FINAL[3] AT THE TIME *BATSON* WAS DECIDED.

A. *Batson* v. *Kentucky*, A Progeny of *Swain* v. *Alabama*

Batson v. *Kentucky*, 476 U.S. ____, 106 S.Ct. 1712 (1986), involved facts strikingly similar to those in the present case. In *Batson*, during the criminal trial of a black man, the prosecutor used his peremptory challenges to strike all four black persons on the venire. An all-white jury was then selected despite the defense motion to discharge the jury panel based upon Sixth and Fourteenth Amendment violations. The defense request for a hearing was also denied.

In *Batson*, this Court reaffirmed the principle in *Swain* v. *Alabama*, 380 U.S. 202 (1965), that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Batson*, 106 S.Ct., at 1716, citing *Swain*, 380 U.S., at 203-204. This Court recognized that "[t]his principle has been consistently and repeatedly reaffirmed, . . . in numerous decisions of this Court both preceding and following *Swain*." *Batson*, 106 S.Ct., at 1716.

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[3] "'By final . . . [is meant] where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before [the] decision in' *Batson* v. *Kentucky*." *Allen* v. *Hardy*, 476 U.S. ____, 54 U.S.L.W. 3856, n.1 (June 30, 1986), quoting from *Linkletter* v. *Walker*, 381 U.S. 618, 622, n.5 (1965).

Batson departed from *Swain* only on the question of defendant's standard of proof of an equal protection violation in the context of peremptory challenges. *Allen*, 54 U.S.L.W., at 3857. In *Swain*, this Court held that since the presumption in any case is that the prosecutor is using the State's peremptories to obtain a fair and impartial jury, this presumption is not overcome by allegations that in a case at hand all blacks were removed from the jury. *Id.*, 380 U.S., at 222. *Swain* went on to state that it was impermissible for a prosecutor to use his or her challenges to exclude blacks from the jury "for reasons wholly unrelated to the outcome of the particular case on trial" or to deny to blacks "the same right and opportunity to participate in the administration of justice enjoyed by the white population." *Id.*, at 224. Thus, under *Swain* a black defendant could establish a prima facie case of purposeful disrcimination through proof that the peremptory challenge system was "being perverted" in that manner. *Ibid.* *Swain* suggests that an inference of discrimination could be raised "when the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries." *Id.*, at 223.

To the extent that lower courts had interpreted *Swain* to require proof of repeated striking of blacks over a number of cases to establish a violation of the Equal Protection Clause, *Batson* rejected this evidentiary formula for proof of discrimination "as inconsistent with standards that have developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Batson*, 106 S.Ct., at 1721. This Court in *Batson* acknowledged that "since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*." *Batson*, 106 S.Ct., at 1722; (emphasis in original).

Specifically addressing the issue of proof in a case of purposeful discrimination involving the use of peremptories, this Court held:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, [citation omitted], and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." [Citation omitted]. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination. *Id.*, at 1722-1723.

Since *Batson* merely reiterated the long-standing constitutional principle of *Swain*, *Batson* represented no clear break in the law. As recently stated by this Court in *Shea* v. *Louisiana*, 470 U.S. ___, 105 S.Ct. 1065, 1069 (1985), unless a constitutional rule "is so clearly a break

with the past that prior precedents mandate nonretroactivity, . . . [the] new . . . rule is to be applied to cases pending on direct review when the rule was adopted." In *United States* v. *Johnson*, 457 U.S. 537, 551 (1982), a clear break case is described as one in which this Court "disapproves a practice this Court arguably has sanctioned in prior cases."

Applying these definitions to *Batson*, it is clear *Batson* did not come within a "clear break" exception for retroactivity. *Batson* established no new principle of constitutional law but reiterated the long-standing prohibition against the practice of racial discrimination in jury selection.

The standard of proof adopted in *Batson*, while it differed from the standard discussed in *Swain*, was well-grounded in long-standing precedents of this Court on proof of purposeful discrimination. This Court in *Batson* specifically recognized this, stating:

> These decisions are in accordance with the proposition, articulated in *Arlington Heights* v. *Metropolitan Housing Corp.* [429 U.S. 252 (1977)], that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions. [Citation omitted]. *Id.*, 106 S.Ct., at 1722.

Petitioner comes before this Court on the same issue recently decided in *Batson*. In his case, the same prosecutor in the Jefferson Circuit Court who prosecuted *Batson*, struck four of five black veniremen, using four of his six peremptory challenges. The prosecutor declined to give reasons for his exercise of the strikes despite a

defense motion. The remaining black juror was randomly selected by the clerk for exclusion from the jury. Thus, no blacks sat on petitioner's jury. Based on these facts, petitioner is clearly entitled to relief under the holding of *Batson*. The only issue to examine, thus, is whether *Batson* is to be applied retroactively to petitioner's case which was pending on direct appeal at the time *Batson* was decided.[4]

B. An Overriding Criterion For Determining Retroactivity Is Whether The Case Presently Before This Court Is On Direct Appeal or Under Collateral Review.

This Court has distinguished between cases arising on direct appeal or under collateral review when considering whether a constitutional ruling is to be given retroactive effect or not. Prior to 1965 this consideration was insignificant since until then, a general rule of retrospective application to all cases prevailed for constitutional decisions of the Court. In *Linkletter* v. *Walker*, 381 U.S. 618 (1965), this Court held for the first time that a newly adopted constitutional ruling need not be given full retroactive application. Prior to *Linkletter*, "both the common law and . . . [this Court's] own decisions recognized a general rule of retrospective effect for the constitutional decisions of this Court . . . subject to [certain] limited exceptions." *United States* v. *Johnson*, 457 U.S., at 542, citing *Robinson* v. *Neil*, 409 U.S. 505, 507 (1973).

In *Linkletter*, this Court addressed the question of whether the exclusionary rule of *Mapp* v. *Ohio*, 367 U.S. 643 (1961), should apply to state convictions which had become final before the *Mapp* decision. This Court

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[4] *Griffith* was pending before this Court on his writ for petition of certiorari at the time *Batson* was handed down.

acknowledged in the beginning of *Linkletter* that cases pending on direct review when *Mapp* was decided had already received the benefit of *Mapp's* rule. *Linkletter*, 381 U.S., at 622, n.4.

Employing the test of "weigh[ing] the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation," *Id.*, 381 U.S., at 629, this Court concluded the *Mapp* rule should not apply to convictions that had become final before the *Mapp* decision.

In *Tehan* v. *United States ex. rel. Shott*, 382 U.S. 406 (1966), this Court also determined, after applying the *Linkletter* test, that the rule of *Griffin* v. *California*, 380 U.S. 609 (1965) (prohibiting comment on a state defendant's failure to testify) was nonretroactive to convictions final before the *Griffin* decision. This Court again confirmed that there was "no question of the applicability of the *Griffin* rule to cases still pending on direct review at the time it was announced." *Tehan*, 382 U.S., at 409.

In *Johnson* v. *New Jersey*, 384 U.S. 719 (1966), and *Stovall* v. *Denno*, 388 U.S. 293 (1967), this Court departed from this basic tenet and held that this Court could, in the interest of justice, balance three factors to determine whether a "new" constitutional rule should apply retrospectively or prospectively:

> a) the purpose to be served by the new standards;
>
> b) the exent of the reliance by law enforcement authorities on the old standards; and
>
> c) the effect on the administration of justice of a retroactive application of the new standards.
>
> *Stovall*, 388 U.S., at 297.

In the interim between *Stovall* and *United States* v. *Johnson*, the retroactivity determinations often varied from case to case as this Court applied the *Stovall* balancing process. "Because the balance of the three *Stovall* factors inevitably has shifted from case to case, it is hardly surprising that, for some, the subsequent course of *Linkletter* became almost as difficult to follow as the tracks made by the beast of prey in search of its intended victim." *United States* v. *Johnson*, 457 U.S., at 544, citing *Mackey* v. *United States*, 401 U.S. 667, 676 (1971) (separate opinion of Harlan, J.).

The basis for distinction between cases on direct appeal and those on collateral review in retroactivity determinations is found as early as 1801 in *United States* v. *Schooner Peggy*, 5 U.S. 103, 110 (1801), where Chief Justice Marshall wrote:

> It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied . . . [And] where individual rights . . . are sacrificed for national purposes . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

"In a consistent stream of separate opinions since *Linkletter*, Members of this Court have argued against selective awards of retroactivity. Those opinions uniformly have asserted that, at a minimum, all defendants whose cases were still pending on direct appeal at the time of the

law-changing decision should be entitled to invoke the new rule." *United States* v. *Johnson*, 457 U.S., at 545.[5]

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[5] See, *e.g.*, *Brown* v. *Louisiana*, 447 U.S. 323, 337 (1980) (POWELL, J., with whom STEVENS, J., joined, concurring in judgement); *Harlin* v. *Missouri*, 439 U.S. 459, 460 (1979) (POWELL, J., concurring in judgments); *Hankerson* v. *North Carolina*, 432 U.S. 233, 245 (1977) (MARSHALL, J., concurring in judgment); *id.* at 246, (POWELL, J., concurring in judgment); *United States* v. *Peltier*, 422 U.S. 531, 543 (1975) (Douglas, J., dissenting); *Daniel* v. *Louisiana*, 420 U.S. 31, 33 and n. (1975) (Douglas, J., dissenting); *Michigan* v. *Tucker*, 417 U.S. 433, 461 (1974) (Douglas, J., dissenting); *Michigan* v. *Payne*, 412 U.S. 47, 58 (1973) (Douglas, J., dissenting); *id.*, at 59, (MARSHALL, J., dissenting); *Adams* v. *Illinois*, 405 U.S. 278, 286 (1972) (Douglas J., with whom MARSHALL, J., concurred, dissenting); *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion of Harlan, J.); *id.*, at 713 (Douglas, J., with whom Black, J., concurred, dissenting); *Williams* v. *United States*, 401 U.S. 646, 665 (1971) (MARSHALL, J., concurring in part and dissenting in part); *Coleman* v. *Alabama*, 399 U.S. 1, 19 (1970) (Harlan, J., concurring in part and dissenting in part); *Von Cleef* v. *New Jersey*, 395 U.S. 814, 817 (1969) (Harlan, J., concurring in result); *Jenkins* v. *Delaware*, 395 U.S. 213, 222 (1969) (Harlan, J., dissenting); *Desist* v. *United States*, 394 U.S. 244, 255 (1969) (Douglas, J., dissenting); *id.*, at 256 (Harlan, J., dissenting); *id.*, at 269 (Fortas, J., dissenting); *Fuller* v. *Alaska*, 393 U.S. 80, 82 (1968) (Douglas, J., dissenting); *DeStefano* v. *Woods*, 392 U.S. 631, 635 (1968) (Douglas J., with whom Black, J., joined, dissenting); *Stovall* v. *Denno*, 388 U.S. 293, 302 (1967) (Douglas, J., dissenting); *id.*, at 303 (Black, J., dissenting); *Johnson* v. *New Jersey*, 384 U.S. 719, 736 (1966) (Black, J., with whom Douglas, J., joined, dissenting); *Whisman* v. *Georgia*, 384 U.S. 895 (1966) (Douglas, J., dissenting); *Tehan* v. *United States ex rel. Shott*, 382 U.S. 406, at 419 (Black, J., with whom Douglas, J., joined, dissenting); *Linkletter* v. *Walker*, 381 U.S. 618, 640 (Black, J., with whom Douglas, J., joined, dissenting). Citations from *United States* v. *Johnson*, 457 U.S. at 545-546, n.9. *See e.g.*, *Solem* v. *Stumes*, 465 U.S. 638, 651 (1984) (POWELL, J., concurring); *Shea* v. *Louisiana*, 470 U.S. ____, 105 S.Ct. 1065, 1074 (1985) (REHNQUIST, J., dissenting).

As this Court recognized in *United States* v. *Johnson*, Justice Harlan delineated three norms of constitutional ajudication violated by this Court's failure to apply new constitutional rules to cases pending on direct appeal at the time of the constitutional decision in his well renowned opinions in *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (dissenting opinion), and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (separate opinion). First, Justice Harlan argued this Court's "ambulatory retroactivity doctrine" cut this Court loose from the force of precedent, "mitigat[ing] the practical force of *stare decisis*." *Mackey*, 401 U.S., at 681.

Second, Justice Harlan accurately characterized the basic unfairness of applying a new constitutional rule to one litigant before this Court while failing to apply it to other litigants with cases pending on direct appeal at the time of the rule's adoption, placing this Court in the role of super-legislature:

> We announce new constitutional rules, then, only as a correlative of our dual duty to decide those cases over which we have jurisdiction and to apply the Federal Constitution as one source of the matrix of governing legal rules. We cannot release criminals from jail merely because we think one case is a particularly appropriate one in which to apply what reads like a general rule of law or in order to avoid making new legal norms through promulgation of dicta. This serious interference with the corrective process is justified only by necessity, as part of our task of applying the Constitution to cases before us. Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review. *Mackey*, 401 U.S., at 678-79.

Finally, Justice Harlan argued that choosing one litigant over others with cases pending on direct review departed from the principle of treating similarly situated defendants similarly:

> [W]hen another similarly situated defendant comes before us, we must grant the same relief or give a principled reason for acting differently. We depart from this basic judicial tradition when we simply pick and choose from among similarly situated defendants those who alone will receive the benefit of a "new" rule of constitutional law. *Desist* v. *United States*, 394 U.S., at 258-259.

Petitioner submits he should receive the benefit of the *Batson* ruling because his case was pending direct review at the time of the ruling without regard to the balancing test of *Stovall* or to whether *Batson* represented a clear break with the law. Petitioner respectfully submits that this Court should adopt the position of Justice Harlan and so rule. *See Mack* v. *Oklahoma*, 459 U.S. 900 (1982), where the case was remanded per curiam in the light of *United States* v. *Johnson*. The *Mack* case involved the failure of the trial court to give a requested instruction on a defendant's failure to testify. Mack's case was pending on direct appeal when *Carter* v. *Kentucky*, 450 U.S. 288 (1981) was decided. *Mack*, 459 U.S., at 901 (dissenting opinion).

A failure to grant relief to petitioner would indeed reflect simply fishing one case from the stream of appellate review and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule. Petitioner was prosecuted by the same prosecutor as was *Batson*. That prosecutor used the same unconstitutional practice in this case as he did in *Batson*. Both cases came from the same circuit court, albeit different divisions. A

denial of relief to petitioner would indeed be an ironical denial of relief to a "similarly situated defendant."

To apply *Batson* to all cases pending on direct review "(a) would provide a principle of decision-making consonant with the Court's original understanding in *Linkletter* v. *Walker*, [citation omitted] and *Tehan* v. *United States ex rel. Shott* [citation omitted], (b) would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case, and (c) would further the goal of treating similarly situated defendants similarly." *Shea*, 105 S.Ct.,1069 (1985), discussing the holding of *United States* v. *Johnson*, *supra*.

C. The Holdings Of *United States* v. *Johnson* And *Shea* v. *Louisiana* Both Dictate *Batson* Should Be Applied to Petitioner's Case.

In *United States* v. *Johnson*, this Court recognized a threshold test for a retrospectivity determination. "First, when a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively." *Id.*, 457 U.S., at 549.

"Conversely, where the Court has expressly declared a rule of criminal procedure to be 'a clear break with the past,' *Desist* v. *United States*, [citation omitted] it almost invariably has gone on to find such a newly minted principle nonretroactive." *United States* v. *Johnson*, *supra*. "In this second type of case, the traits of the particular constitutional rule have been less critical than the Court's express threshold determination that the 'new' constitutional interpretatio[n] . . . so change[s] the law that prospectivity is arguably the proper course." *Id.*, citing *Williams* v. *United States*, 401 U.S. 646 (1971).

"Third, the Court has recognized full retroactivity as a necessary adjunct to a ruling that a trial court lacked authority to convict or punish a criminal defendant in the first place." *United States* v. *Johnson*, 457 U.S., at 550.

Petitioner's case fits most readily into the first of these categories. While *Batson* may not have applied settled principles to a new set of facts when the focus is only on *Swain*, it did so in light of the post-*Swain* decisions relied upon in *Batson*. It is true that the principle of *Batson* reaffirmed the constitutional principle of *Swain* that a state's purposeful or deliberate denial to blacks of participation as jurors on account of race violates the Equal Protection Clause. As mentioned earlier, however, the evidentiary principle of *Batson* was contained in the post-*Swain* decisions discussed at length in *Batson*, namely, that "'[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comprable decisions.'" *Id.*, 106 S.Ct., at 1722 quoting *Arlington Heights*, 429 U.S., at 266 n.14. As the Court noted, it is also well established that if a party makes out "a prima facie case of purposeful discrimination by showing that the totality of the facts give rise to an inference of discrimination," the burden shifts to the State to explain the exclusions. *Batson*, 106 S.Ct., at 1721, quoting *Washington* v. *Davis*, 426 U.S. 229, 239-42 (1976), citing *Alexander* v. *Louisiana*, 405 U.S. 625, 632 (1972).

Batson applied settled constitutional principles to a new set of facts, that is, the area of peremptory challenges. Therefore, *Batson* should be applied retroactively to cases on direct appeal.

On the other hand, *Batson* "did not announce an entirely new and unanticipated principle of law. In general, this Court has not subsequently read a decision to work a 'sharp break in the web of the law,' *Milton* v. *Wainwright*, 407 U.S. 371, 381, n.2, (1972) (Stewart, J., dissenting), unless that ruling caused 'such an abrupt and fundamental shift in doctrine as to constitute an entirely new rule which in effect replaced an older one.'" *United States* v. *Johnson*, 457 U.S. at 551, citing *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481 (1968). *United States* v. *Johnson* gives the following description of such a "clear break":

> Such a break has been recognized only when a decision explicitly overrules a past precedent of this Court, [citations omitted] or disapproves a practice this Court arguably has sanctioned in prior cases [citations omitted], or overturns a longstanding and widespread practice to which this Court has not spoken, but which a near-unanimous body of lower court authority has expressly approved. [Citations omitted.] *Id.*, at 551.

Batson did none of these. *Batson* expressly overruled no clear past precedent of this Court. *Batson* expressly reaffirmed the principle of *Swain* declaring a state's purposeful denial to blacks of participation as jurors on account of race an Equal Protection violation. This principle was certainly not new, as both *Swain* and *Batson* recognized the principle dated back to more than a century ago when the Court held in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that the state denies a black defendant equal protection when it puts him on trial before a jury from which members of his race have been purposefully excluded.

The only point on which *Batson* departed from *Swain* was on the standard of proof required for a prima facie case of purposeful discrimination in the context of the state's use of peremptories to strike black jurors at a black

defendant's trial. Thus, *Batson* did not overrule any constitutional principle of *Swain* but merely established a different evidentiary standard which was based on long-standing precedents since *Swain*.

Nor did *Batson* disapprove a practice this Court arguably has sanctioned in prior cases. Far from it. The prosecution's practice of striking all blacks from the jury based on race was specifically *disapproved* of in *Swain*, as well as cases predating and post-dating *Swain*.[6]

Finally, it is equally plain *Batson* does not fall into the third category of cases posing no problem of retroactivity. *Batson* did not hold that the trial court lacked authority to convict or punish James Batson in the first place. Nor did this Court's reading of the Fourteenth Amendment immunize Batson from punishment. The holding in *Batson* reversed the Kentucky Supreme Court's decision and remanded for further proceedings.

In *United States* v. *Johnson* this Court, after concluding that Johnson's case did not fall into any of the three

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[6] *See, e.g., Strauder* v. *West Virginia*, 100 U.S. 303 (1880); *Neal* v. *Delaware*, 103 U.S. 370 (1881); *Norris* v. *Alabama*, 294 U.S. 587 (1935); *Hollins* v. *Oklahoma*, 295 U.S. 394 (1935) (*per curiam*); *Pierre* v. *Louisiana*, 306 U.S. 354 (1939); *Patton* v. *Mississippi*, 332 U.S. 463 (1947); *Avery* v. *Georgia*, 345 U.S. 559 (1953); *Hernandez* v. *Texas*, 347 U.S. 475 (1954); *Whitus* v. *Georgia*, 385 U.S. 545 (1967); *Jones* v. *Georgia*, 389 U.S. 24 (1967) (*per curiam*); *Carter* v. *Jury Commission of Green County*, 396 U.S. 320, (1970); *Castaneda* v. *Partida*, 430 U.S. 482 (1977); *Rose* v. *Mitchell*, 443 U.S. 545 (1979); *Vasquez* v. *Hillery*, 474 U.S. ____, 106 S.Ct. 617 (1986).

"The basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries.' [citations omitted.]. *Alexander* v. *Louisiana*, 405 U.S. 625, 626, n.3 (1972). These principles are reinforced by the criminal laws of the United States. 18 U.S.C. Sec. 243. Citation from *Batson*, 106 S.Ct., at 1716, n.3.

categories posing no difficult questions of retroactivity, went on to state, "we next must ask whether that question would be fairly resolved by applying the rule in *Payton* to all cases still pending on direct appeal at the time when *Payton* was decided. Answering that question in the affirmative would satisfy each of the three concerns stated in Justice Harlan's opinions in *Desist* and *Mackey*." *United States* v. *Johnson*, 457 U.S., at 554. Therefore, even if this Court should find *Batson* does not fall into the first category posing no problem for retroactivity, the same conclusion as that reached in *Johnson* is clearly appropriate in petitioner's case.

While this Court, in *United States* v. *Johnson* specifically expressed no view on the retroactivity of decisions construing any constitutional provisions other than the Fourth Amendment, this Court reached the same result in *Shea* v. *Louisiana*, 470 U.S. ____, 105 S.Ct. 1065 (1985). In holding *Edwards* v. *Arizona*, 451 U.S. 477 (1981), retroactive to cases pending on direct appeal at the time of the *Edwards* ruling, this Court stated:

> We now conclude, however, that there is no reason to reach in this case a result that is different from the one reached in *Johnson*. [citation omitted]. There is nothing about a Fourth Amendment rule that suggests that in this context it should be given greater retroactive effect than a Fifth Amendment rule. *Shea*, 105 S.Ct., at 1070.

In an approach clearly appropriate to petitioner's case, this Court in *Shea* stated that "Justice Harlan's reasoning—that principled decision-making and fairness to similarly situated petitioners requires application of a new rule to all cases pending on direct-review is applicable with equal force to the situation presently before us." *Id.*, 105 S.Ct., at 1070.

D. In Any Event, An Application Of The *Stovall* Criteria Supports The Retroactive Application Of The Holding Of *Batson* To Cases Pending On Direct Appeal At The Time Of The *Batson* Decision.

An analysis which predates *United States* v. *Johnson* involved the application of the following criteria in order to make a retroactive determination in any given case:

a) the purpose to be served by the new standards;

b) the extent of the reliance by law enforcement authorities on the old standards; and

c) the effect on the administration of justice of a retroactive application of the new standards. *Stovall* v. *Denno*, 388 U.S. at 297.

Although petitioner has already given reasons why he does not believe this balancing test is appropriate for cases on direct appeal at the time a "new" constitutional rule is announced, he will *arguendo* demonstrate that these criteria also support limited retrospectivity in cases not yet final.

a) Purpose of *Batson* rule

The foremost consideration in this balancing of criteria is the purpose to be served by the new rule. The factors of reliance on the old rule and impact of the new rule on the administration of justice become considerations only "when the degree to which the rule enhances the integrity of the factfinding process is sufficiently small." *Hankerson* v. *North Carolina*, 432 U.S. 233, 243 (1977).

The integrity of the truth-finding process is significantly enhanced by the holding of *Batson* rendering retroactivity to cases pending on direct appeal appropriate. This Court has recognized "that the extent to which the purpose of a new constitutionl rule requires its retroactive

application 'is necessarily a matter of degree.'" *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980), quoting from *Johnson* v. *New Jersey, supra*, 384 U.S., at 729. "Constitutional protections are frequently fashioned to serve multiple ends; while a new standard may marginally implicate the reliability and integrity of the factfinding proces, it may have been designed primarily to foster other, equally fundamental values in our system of jurisprudence." *Brown*, 447 U.S., at 329. "Not every rule that 'tends incidentally' to avoid unfairness at trial must be accorded retroactive effect." *Id.*, quoting from *Gosa* v. *Mayden*, 413 U.S. 665, 680 (1973).

"The extent to which a condemned practice infects the integrity of the truth-determining process at trial is a 'question of probabilities'" *Stovall*, 388 U.S., at 298, quoting *Johnson* v. *New Jersey*, 384 U.S., at 729.

This Court has acknowledged that "[b]y serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial." *Allen*, 54 U.S.L.W., at 3857. *Allen* also recognized that the *Batson* decision served other values as well. This Court specified two of these purposes: ensuring that states do not discriminate against citizens summoned to sit in judgment against a member of their own race and strengthening public confidence in the administration of justice. *Id.*, at 3857. After noting the other procedures protecting a defendant's interest in a neutral factfinder that *Batson* joins, this Court ultimately concluded in *Allen* that the new rule did not have such a fundamental impact on the integrity of factfinding as to compel retroactive application to cases whose judgments were final at the time of the decision, that is, those arising on collateral review.

While the *Batson* rule may not have had such a fundamental impact on the integrity of factfinding as to compel *complete* retroactivity, it surely does have a fundamental impact. And certainly it has a fundamental enough impact on factfinding to compel the minimally limited retroactivity in question.

This Court has recognized "that the exclusion of a discernible class from jury service injures not only those defendants who belong to the excluded class, but other defendants as well, in that it destroys the possibility that the jury will reflect a representative cross section of the community." *Peters* v. *Kiff*, 407 U.S. 493, 500 (1972). In *Williams* v. *Florida*, 399 U.S. 78 (1970), after delineating some essential features of the jury as guaranteed by the Sixth Amendment, this Court concluded that the Sixth Amendment comprehended "a fair possibility for obtaining a representative cross-section of the community." *Id.*, at 100.

In rejecting the exclusion of women from jury service in the federal courts, this Court dicussed the necessity of representation of discernible groups on the jury:

> The truth is that the two sexes are not fungible; a community made up exclusively of one is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded. *Ballard* v. *United States*, 329 U.S. 187, 193-194 (1946).

"When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to

assume that the excluded group will consistently vote as a class in order to conclude . . . that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff*, 407 U.S., at 503-504. (opinion of Marshall, J.). This removal of human nature and experience from the jury room certainly directly impacts upon the integrity of the truth-finding process.

Of course, prosecutors would not have been indulging in the practice of striking jurors on the basis of race if this did not affect the truth-finding function of the trial itself. It appears self-evident that the reason a prosecutor would eliminate blacks from a jury is in the belief that this will affect the outcome of the case by making a conviction easier to obtain. That belief is supported by sociological studies.[7]

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[7] Social scientists have documented both the tendency of prosecutors to exclude blacks from juries, and the pro-prosecution effect such exclusions may have on a verdict, especially where the government's evidence is insubstantial and the defendant is black. *See, e.g.*, Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev.L. & Soc. Change 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19-22; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 62 (1974); Davis and Lyles, *Black Jurors*, 30 Guild Practitioner 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. St. U.L.Q. 415-37; Ginger, *What Can Be Done to Minimize Discrimination in Jury Trials?*, 20 J.Pub.L. 427 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 1975-80 (1975); H. Kalven and H. Zeisel, *The American Jury* 196-98,

In *Brown* v. *Louisiana*, 447 U.S. 323 (1980), this Court held that the rule of *Burch* v. *Louisiana*, 441 U.S. 130 (1979), that a conviction of a nonpetty criminal offense by a non-unanimous six-person jury violates an accused's Sixth and Fourteenth Amendment right to a jury trial, must be given retroactive effect. This Court recognized in *Brown* that "[t]he right to jury trial guaranteed by the Sixth and Fourteenth Amendments 'is a fundamental right, essential for preventing miscarriages of justice and for assuring that fair trials are provided for all defendants." *Id.*, 447 U.S., at 329, quoting from *Duncan* v. *Louisiana*, 391 U.S. 145, 158 (1968).

The holding of *Brown* supports petitioner's position for the retroactive application of *Batson* to cases pending on direct appeal. This Court's rationale in *Brown* concerning the purpose of the *Burch* rule is certainly directly applicable to the case at bar:

> In sum, *Burch* established that the concurrence of six jurors was constitutionally required to preserve the substance of the jury trial right and assure the reliability of its verdict. It is difficult to envision a constitutional rule that more fundamentally implicates "the fairness of the trial—the very integrity of the fact-finding process." [citation omitted.] "The basic purpose of a trial is the determination of truth," [citation omitted], and it is the jury to whom we have

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210-13 (1966); McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J.Psych. 93 (1976); Rhine, *The Jury: A Reflection of the Prejudices of the Community in Justice on Trial* 41 (D. Douglas & P. Nobel, eds. 1971); R. Simon, *The Jury and the Defense of Insanity*, 111 (1977); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels*, 33-35, 154-60 (1977).

> entrusted the responsibility for making this determination in serious criminal cases. Any practice that threatens the jury's ability properly to perform that function poses a similar threat to the truth-determining process itself. The rule in *Burch* was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application. *Brown*, 447 U.S., at 334. (Footnote omitted).

In his concurring opinion in *Batson*, Justice White preliminarily indicated his adherence to the rule announced in *DeStefano* v. *Woods*, 392 U.S. 631 (1968), that *Duncan* v. *Louisiana*, 391 U.S. 145 (1968), holding States could not deny jury trials in criminal cases, did not apply retroactively to cases in which trials began prior to the date of the *Duncan* decision. Justice White also mentioned *Daniel* v. *Louisiana*, 420 U.S. 31 (1975) (per curiam), which held nonretroactive the decision in *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), finding the systemic exclusion of women from jury panels a violation of the Sixth and Fourteenth Amendments.

Petitioner respectfully submits both are distinguishable from the case at bar. Both cases considered in *DeStefano*, *Duncan* and *Bloom* v. *Illinois*, 391 U.S. 194 (1968), represented a clear break in the law. Both cases held for the first time that the Sixth Amendment's right to a jury trial was incorporated in the due process clause of the Fourteenth Amendment and, thus, applicable to the states. Those decisions constituted a reversal of prior decisions of this Court holding the Sixth Amendment was not applicable to the States. *DeStefano*, 392 U.S., at 634. Also, as stated in *Bloom*, the proposition that a jury trial need not be provided in contempt cases was "a constitutional principle which is firmly entrenched and which has behind it weighty and ancient authority." *Bloom*, 391 U.S., at 197-198.

Similarly, *Taylor* v. *Louisiana*, which this Court declined to apply retroactively in *Daniel*, represented new law sufficient to be characterized as a clear break. This Court stated in *Taylor*:

> Although this judgment may appear a foregone conclusion from the pattern of some of the Court's cases over the past thirty years, as well as from legislative developments at both federal and State levels, it is nevertheless true that until today no case had squarely held that the exclusion of women from jury venires deprives a criminal defendant of his sixth amendment right to trial by an impartial jury drawn from a fair cross-section of the community. *Taylor*, 419 U.S., at 535-536.

On the contrary, the principle of *Batson* that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause," is a firmly entrenched concept with weighty and ancient authority behind it. *Swain*, 380 U.S., at 203-204, and *Strauder*, 100 U.S., at 309.

"When the prosecution unconstitutionally uses its peremptory strikes to remove blacks and Hispanics from the jury, the threat to the truth-finding process is not cured by measures designed merely to ensure that white jurors permitted to serve satisfy the legal standard for impartiality." *Allen*, 54 U.S.L.W. at 3857. (Marshall, J., dissenting).

However, this Court has indicated that the *Batson* "rule joins other procedures that protect a defendant's interest in a neutral factfinder." *Allen*, 54 U.S.L.W., at 3857. For example, "*[v]oir dire* examination is designed to identify veniremen who are biased so that those persons may be excused through challenges for cause." *Id.*, at 3857, n.2.

But, in a case such as the one at bar, there is no federal constitutional right of the defendant to question the potential jurors concerning racial prejudice simply because the offense to be tried involved an alleged criminal confrontation between a black assailant and a white victim. *Ristaino* v. *Ross*, 424 U.S. 589 (1976). *See Rosales-Lopez* v. *United States*, 451 U.S. 182 (1981). *But see Turner* v. *Murray*, 476 U.S. ____, 106 S.Ct. 1683, 1688 (1986), holding that, as a matter of federal constitutional law, "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of race." No federal constitutional precept insured that the defense could test the racial prejudices of the potential jurors in the instant case.

But even assuming *arguendo* that the trial judge below would have permitted such a defense inquiry concerning racial prejudice, petitioner's defense counsel may have elected not to inject the issue of racial bias into the voir dire. Such "an inquiry" could "create the impression 'that justice in a court of law may turn upon the pigmentation of skin [or] the accident of birth.'" *Rosales-Lopez* v. *United States*, *supra* at 190. As this Court has previously recognized, "it is usually best to allow the defendant to resolve this conflict by making the determination of whether or not he would prefer to have the inquiry into racial or ethnic prejudice pursued." *Id.*, at 192. *See Turner* v. *Murray*, *supra*, 106 S.Ct., at 1688, n.10. It begs reality to suggest that the mere possibility of voir dire questioning on racial prejudice, with its potential negative effects for the defense in any given case, was an adequate procedure to protect a defendant's interest in a neutral fact-finder when the defense had reason to believe the prosecutor's peremptory challenges were being consciously employed

to exclude certain veniremen from the petit jury on account of their race.

According to this Court, these "other mechanisms [which] existed prior to [the] decision in *Batson* creat[ed] a high probability that the individual jurors seated in a particular case were free from bias." *Allen*, 54 U.S.L.W., at 3857. The only other example of such prophylactic "mechanism" or "procedure" catalogued by this Court was the use of a cautionary instruction on passion or prejudice. However, neither the trial judge's orientation of the venirepersons during vior dire nor the jury instructions in the case at bar "emphasize[d] that the jurors must not rest their decision on any impermissible factor, such as passion or prejudice." *Id.*, at 3857, n.2. Kentucky's sparse jury instructions in criminal cases have been previously described by this Court as "rather Spartan." *Taylor* v. *Kentucky*, 436 U.S. 478, 486 (1978).

Since neither voir dire on racial bias nor cautionary instructions on passion or prejudice are constitutionally mandated, even upon defense request, it is difficult to conclude that such discretionary procedures insulated defendants in criminal cases from the calculated impact on the integrity of factfinding generated by the prosecution's efforts to remove from the jury in trials of cross-racial crimes potential jurors of the same race as the defendant.

In this Court's past decisions, when a large group, such as blacks, was "excluded [from jury service] for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case, the exclusion raised at least the possiblity that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community." *Lockhart* v. *McCree*, 476 U.S. ___, 106 S.Ct. 1758, 1765 (1986).

For far more than a century this Court has dealt with racial discrimination. One of the earliest forms of discrimination appeared in the arena of jury selection. This Court has unwaveringly held that exclusion from the jury venire of minority persons violates the Equal Protection Clause. *Strauder*, 100 U.S., at 305.

In a plethora of other areas, judicial decisions have struck down discriminatory actions based on race. For instance, *see Palmore* v. *Sidoti*, 466 U.S. 429 (1984); *Loving* v. *Virginia*, 388 U.S. 1 (1967); *Korematsu* v. *United States*, 323 U.S. 214 (1944); *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886).

The breadth and history of these cases as well as the anti-discrimination legislation of this country are a reflection of the existence and pervasiveness of racism in this country.

"'[One hundred fourteen] years after the close of the War Between the States and nearly 100 years after *Strauder*, racial and other forms of discrimination still remain a fact of life, in the administration of justice as in our society as a whole.'" *Vasquez* v. *Hillery*, 476 U.S. ___, 106 S.Ct. 617, 624 (1986) citing *Rose* v. *Mitchell*, 443 U.S. 545, 558-559 (1979).

The concept that an all-white jury which is the result of racially-directed peremptory challenges will necessarily be free from bias ignores the historical racism plaguing this country. Only recently this Court acknowledged as much, particularly in cases involving black defendants and white victims such as the case at bar. "Once rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence . . ." *Turner*, 106 S.Ct. at 1688, n.8 (1986). Certainly in light of the historical fact of

racism, the possiblity that a jury will be bias-free cannot dilute the impact of the truth-finding effect of the *Batson* rule.

Only recently this Court has acknowledged the impact of discrimination in selection of the grand jury upon the truth-finding process, rejecting the State's position that such discrimination should be held harmless error:

> Nor are we persuaded that discrimination in the grand jury has no effect on the fairness of the criminal trials that result from that grand jury's actions. The grand jury does not determine only that probable cause exists to believe that a defendant committed a crime, or that it does. In the hands of the grand jury lies the power to charge a greater offense or a lesser offense; numerous counts or a single count; and perhaps most significant of all a capital offense or a noncapital offense—all on the basis of the same facts. *Vasquez*, 106 S.Ct., at 623 (1986).

The Court concluded such discrimination affected the integrity of the trial process itself, stating, "[E]ven if a grand jury's determination of probable cause is confirmed in hindsight by a conviction on the indicted offense, that confirmation in no way suggests that the discrimination did not impermissibly infect the framing of the indictment and consequently, the nature or very existence of the proceedings to come." *Id.*, 106 S.Ct., at 623. Discrimination in selection of the petit jury could only have as much if not more impact on the nature of trial proceedings.

In petitioner's particular case, racial discrimination in jury selection may well have had more of an impact upon the truth-finding process than in some other cases since Kentucky has jury sentencing as well as jury guilt-innocence determination.[8] *See Turner* v. *Murray*, 476 U.S. ___, 106 S.Ct. 1683 (1986). In *Turner* this Court reversed the capital conviction due to the trial court's failure to allow the defendant accused of an interracial capital crime to question prospective jurors on the issue of racial bias, recognizing that "[i]n a capital sentencing proceeding before a jury, the jury is called upon to make a highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" *Id.*, 106 S.Ct., at 1687. [Citations omitted.]

Petitioner realizes the purpose of the *Batson* rule is a multi-faceted one serving more than one end. Beside the truth-finding function of the rule, one obvious and very important purpose is that of protecting stricken jurors and society against the invidiousness of racial discrimination. "The harm from discriminatory jury selection extends beyond that inflicted upon the defendant and the excluded juror to touch the entire community." *Batson*, 106 S.Ct., at 1718. "That criminal defendants will not be the only beneficiaries of the rule, however, should hardly diminish our assessment of the rule's impact upon the ability of defendants to receive a fair and accurate trial." *Allen*, 54 U.S.L.W., at 3857, (Marshall, J., dissenting).

The purposes of *Batson* support a retroactive application of that decision to cases pending on direct appeal.

b) Reliance

Due regard for the countervailing consideration of reliance does not weigh against retroactivity. In fact,

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[8] In Kentucky "[w]hen the jury returns a verdict of guilty it shall fix the degree of the offense and the penalty, except where the penalty is fixed by law, in which case it shall be fixed by the court." RCr 9.84(1). *See* KRS 532.060 and 532.070.

reliance is not an appropriate consideration with respect to the *Batson* holding since reliance could not have been justifiable.

While *Baton* can be described *arguendo* as an "explicit and substantial break with prior precedent"[9] on the question of standard of proof, it was certainly not a clear break on the question of the constitutional principle it involved. It merely reiterated the long-standing constitutional precept contained in *Swain* that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." *Swain*, 380 U.S. at 204.

Moreover, on the question of standard of proof, the ruling of *Batson* was far from unforeseen. On the subject of a defendant's standard of proof, "[i]n the nearly two decades since it was decided, *Swain* has been the subject of almost universal and often scathing criticism. Since *every* defendant is entitled to equal protection of the laws and should therefore be free from the invidious discrimination of state officials, it is difficult to understand why several must suffer discrimination because of the prosecutor's use of peremptory challenges before any defendant can object." *McCray* v. *New York*, 461 U.S. 961, 964-965 (1983) (footnote omitted).

Prior to *Batson*, several state courts and two federal circuits had adopted approaches to the problem of proof of discrimination during jury selection which essentially bypassed the *Swain* "case by case" proof requirement usually through a Sixth Amendment analysis or on state constitutional grounds. *See McCray* v. *Abrams*, 750 F.2d

[9] *Allen*, 54 U.S.L.W., at 3857.

1113 (2nd Cir. 1984); *Booker* v. *Jabe*, 775 F.2d 762 (6th Cir. 1985), cert. pending No. 85-1028; *People* v. *Wheeler*, 22 Cal. 3rd 258, 583 P.2d 748 (1978); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *State* v. *Crespin*, 94 N.M. 486, 612 P.2d 716 (Ct. App. 1980); *State* v. *Niel*, 457 So.2d 481 (Fla. 1984); *State* v. *Gilmore*, 299 N.J. Supr. 389, 489 A.2d 1175 (1985); *People* v. *Thompson*, 79 A.D. 87, 435 N.Y.S.2d 739 (2d Dept. 1981), overruled, *People* v. *McCray*, 57 N.Y.2d 342, 457 N.Y.S.2d 441 (1982); *Riley* v. *State*, 496 A.2d 997 (Del. 1985). Some other federal courts held that its supervisory power could be used to scrutinize the prosecutor's exercise of peremptory challenges to strike blacks in a case. *See United States* v. *Jackson*, 696 F.2d 578 (8th Cir. 1982), and *United States* v. *McDaniels*, 379 F.Supp. 1243 (E.D.La. 1974).

Consequently, it was not the case that prosecutors could not forsee the *Batson* ruling on standard of proof. The proliferation of cases raising the issue of the misuse of peremptory challenges demonstrates that the practice was nationwide prior to the *Batson* ruling.[10] For instance,

[10] *See, e.g., People* v. *Wheeler*, 22 Cal. 3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978); *State* v. *Neil*, 457 So.2d 482 (Fla. 1984); *People* v. *Payne*, 106 Ill. App. 3d 1034, 62 Ill. Dec. 744, 436 N.E.2d 1046 (Ill. Ct. App. 1982), rev'd 9 Ill. 2d 135, 457 N.E.2d 1202 (1983); *Commonwealth* v. *Soares*, 377 Mass. 461, 387 N.E.2d 499, cert. denied, 444 U.S. 1 881 (1979); *State* v. *Crespin*, 94 N.M. 2d 486, 612 P.2d 716 (1980); *People* v. *Kagan*, 420 N.Y.S.2d 987 (N.Y.Sup.Ct. App. Div. 1979); *People* v. *Thompson*, 79 A.D.2d 87, 435 N.Y.S.2d 739 (N.Y. Sup. Ct. App. Div. 1981); *People* v. *Boone*, 107 Mis. 2d 301, 433 N.Y.S.2d 955 (Sup. Ct. 1980); *People* v. *McCray*, 57 N.Y.2d 542, 457 N.Y.S.2d 441, 443 N.E.2d 915 (1982); *United States* v. *Newman*, 549 F.2d 240 (2nd Cir. 1977); *United States* v. *McDaniels*, 379 F. Supp. 1243 (E.D. La. 1974); *United States* v. *Childress*, 715 F.2d 1313 (8th Cir. 1983); *United States* v. *Whitfield*, 715 F.2d 145 (4th Cir. 1983); *United States* v. *Clark*, 737 F.2d 679 (7th Cir. 1984); *Wheathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983); *Willis* v. *Zant*, 720 F.2d 1212 (11th Cir. 1983).

the Illinois Supreme Court "has reviewed at least 33 cases in which criminal defendants have alleged prosecutorial misuse of peremptory challenges to exclude Negro jurors." *Williams* v. *Illinois*, 466 U.S. 981, 104 S.Ct. 2364, 2365 (1984) (denial of cert.) (Marshall, J., dissenting). The Eighth Circuit has observed "the frequency with which we have been called upon to examine the prosecutor's practices in this regard in the Western District of Missouri." *United States* v. *Jackson*, 696 F.2d 578, 592 (8th Cir. 1982). And the Louisiana Supreme Court reviewed nine cases in seven years from the same parish, five of which involved the same prosecutor. *State* v. *Brown*, 371 So.2d 751 (La. 1979).

Indeed, prosecutors have publicly admitted that they seek to keep blacks from sitting on criminal trials as a matter of course because they fear blacks will be too sympathetic to a defendant. Thus, an instruction book used by the prosecutor's office in Dallas County, Texas, the site of *Hill* v. *Texas*, 316 U.S. 400 (1942), *Akins* v. *Texas*, 325 U.S. 398 (1945) and *Cassell* v. *Texas*, 339 U.S. 282 (1950), advised prosecutors that they did not want a "member of a minority group" on a jury because he will "almost always empathize with the accused." Brown, McGuire, and Winters, *The Peremptory Challenge as a Manipulative Device in Criminal Trials, Traditional Use or Abuse?* 14 New Eng.L.Rev. 192, 224 (1978).

Aside from the question of foreseeability, the fact that the prosecutorial use of peremptories solely on race was a widespread practice does *not* support a conclusion that prosecutors were justifiably relying on an "old rule." There was no "old rule" which allowed prosecutors to exercise peremptories solely on the basis of race. *Swain* certainly did not allow this. The only question left open in *Swain* was whether defendants would be able to meet the

difficult burden of proof in proving this admittedly unconstitutional prosecutorial practice.

This Court has never held such "[u]njustified reliance [to be] . . . a bar to retroactivity." *Solem* v. *Stumes*, 465 U.S. 638, 646 (1984). Petitioner's case certainly does not demonstrate an arguable situation of justifiable reliance. The prosecutor in this case struck all blacks in *Batson*, and four of five in petitioner's case. The prosecutor has also come under attack in the Kentucky appellate courts for striking all of the black jurors in the following cases:

> *Johnny Earl Williams* v. *Commonwealth*, Ind. No. 85-CR-264, Ky.Ct.Ap. No. 85-CA-2073-MR
>
> *Maurice Debois Gasaway* v. *Commonwealth*, Ind. No. 84-CR-824, Ky.S.Ct. No. 85-SC-494-MR

This pattern of practice, while falling short of the evidentiary standard set out in *Swain*, certainly does not support a finding of justifiable reliance.

"This is not case in which primary conduct by such officials was permitted by one decision of this Court and then prohibited by another. *Swain* made quite clear that the use of peremptory challenges to strike black jurors on account of their race violated the Equal Protection Clause. All *Batson* did was to give defendants a means of enforcing this prohibition." *Allen*, 54 U.S.L.W., at 3858 (Marshall, J., dissenting).

Thus, "the justifiability of the State's reliance . . . was a good deal more dubious than the justification for reliance that has been given weight in [the] *Linkletter* line of cases." *Robinson* v. *Neil*, 409 U.S., at 510. The consideration of reliance does not support nonretroactive application of *Batson* to cases pending on direct appeal.

c) Effect on the Administration of Justice

The effect of a retrospective application of *Batson* to cases pending on direct appeal on the administration of criminal justice would be minimal. In rejecting the total retroactivity of *Batson*, this Court in *Allen* noted that "retroactive application of the *Batson* rule on collateral review of final convictions would seriously disrupt the administration of justice." *Allen*, 54 U.S.L.W., at 3857. The concerns of this Court in the context of collateral review do not apply to cases pending on direct review.

First, the number of cases on direct review would be greatly reduced in comparison to cases on collateral review. Moreover, the number is further reduced in light of the number of state and federal jurisdictions where alternative proof standards had already been adopted under state constitutions, the Sixth Amendment or supervisory powers.[11] Some of those jurisdictions have already addressed specifically the question of retroactivity.[12]

This Court has recognized that there will be no problem in holding evidentiary hearings in cases on direct review since this Court remanded *Batson* for an evidentiary hearing. *Batson*,106 S.Ct., at 1725. The cases on direct appeal would have arisen in about the same time frame as *Batson*, alleviating this Court's concerns with holding hearings in collateral review cases. *Allen*, 54 U.S.L.W., at 3857.

Finally, there should be no burden on prosecutors in explaining their use of peremptories on black jurors in the

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[11] *See* footnote 10, *supra*.

[12] *See, e.g., Commonwealth* v. *Soares*, *supra*, 583 P.2d at 767; *State* v. *Jones*, 485 So.2d 1283 (Fla. 1986); *State* v. *Castillo*, 486 So.2d 565 (Fla. 1986).

few cases to be affected by a limiting retrospectivity ruling. First, the time frame is not too remote. Secondly, since *Swain*, prosecutors who used their peremptories to strike black jurors knew at any time they could be challenged for a pattern of discriminatory practice. As such, prosecutors were constitutionally obligated to keep information about such jurors in order to respond to the challenges made possible under *Swain*.

While under *Swain* prosecutors may not have been required to put reasons for their peremptory strikes against members of a minority race on the record, they clearly were obligated to formulate non-discriminatory reasons for striking jurors. The prosecutor's attempt to explain two of his four challenges in the case at bar suggests that prosecutors were aware of the need to be able to develop a record in the face of a *Swain* challenge long before *Batson*. (A 14).

The minimal impact on the administration of criminal justice clearly supports a ruling of the retroactive application of *Batson* to cases pending on direct review.

CONCLUSION

Petitioner respectfully requests that the decision of the Kentucky Supreme Court in petitioner's case be reversed and that *Batson* v. *Kentucky* be applied retroactively to cases pending on direct appeal at the time *Batson* was decided.

Respectfully submitted,

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No. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

RANDALL LAMONT GRIFFITH, - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

In cases pending on direct appeal, should the holding in *Batson* v. *Kentucky* be given retroactive effect?

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IN THE

SUPREME COURT OF THE UNITED STATES

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No. 85-5221

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v.

COMMONWEALTH OF KENTUCKY, - - *Respondent.*

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF KENTUCKY

BRIEF FOR RESPONDENT

STATEMENT OF THE CASE

September 8, 1982, an assailant took a purse at knifepoint from two women in a parking lot in Louisville, Kentucky. The assailant retreated to a nearby apartment complex. Petitioner resided in this apartment complex (TE II, pp. 134-136). Petitioner was identified by three eyewitnesses as the robber, (TE II, p. 240), and he was duly convicted of first-degree robbery and of being a second-degree persistent felony offender. He was sentenced to twenty years' imprisonment May 21, 1984 (A. 7-8).

In Kentucky, trial attorneys are given strike sheets listing the remaining members of the venire at the conclusion of voir dire. Peremptory challenges are

exercised simultaneously in private by the attorneys, and the court clerk then compiles a list of the remaining jurors (J.A. 5). In this case, which was tried in Louisville, Kentucky, May 15, 1984, the venire consisted of twenty-eight people. The defense exercised all nine of its peremptory challenges, and the prosecutor exercised all six of his peremptory challenges, four of the six against black prospective jurors. Since two prospective jurors were struck by both sides, fifteen jurors remained. Two of these prospective jurors were removed by random draw of the clerk, leaving thirteen jurors seated to hear the case. At least one of the two jurors removed by random draw of the clerk was black (J.A. 15). Although the trial judge thought the racial affiliation of two prospective jurors was indeterminate (J.A. 12), the opinion of petitioner's trial counsel that an all-white jury had been seated was not contested (J.A. 15).

Before the results of the peremptory strikes became known to the parties, petitioner's trial counsel raised the possibility that the black defendant would be tried by an all-white jury. Petitioner's trial counsel requested the court to make a record of the race of the persons struck by the prosecutor and the reasons for the prosecutor striking any blacks if an all-white jury had been selected. The prosecutor took offense from the remarks of petitioner's trial counsel (J.A. 10). The trial judge believed the prosecutor's assertion that he had not struck any member of the panel on account of their race (J.A. 11). The prosecutor noted that he was under no legal obligation to explain his reasons for

exercising any of his peremptory challenges. However, in the heat of argument, he gratuitously explained his reasons for exercising four of his peremptory challenges. He stated that he struck a young black man and a young black woman for the same reason that he struck a young white man, namely, their age. The prosecutor stated he didn't want jurors in the same age category as the petitioner and that, furthermore, studies have shown young persons are less "law and order" citizens (J.A. 14). The prosecutor also stated he struck a white male juror on the basis of his occupation. One of the black jurors, Olivia Williams, was peremptorily challenged by both parties. Thus, only two of the prosecutor's six peremptory challenges went unexplained, and one of those two may very well have been Ms. Williams, who was viewed as undesirable by both parties.

The trial judge ruled that the prosecutor did not have to give reasons for his peremptory challenges (J.A. 16). The trial judge also denied a motion to discharge the panel due to the prosecutor's use of peremptory challenges. Petitioner claimed the prosecutor's use of peremptory challenges violated the Sixth and Fourteenth Amendments to the Constitution of the United States of America (J.A. 15). Petitioner's conviction was affirmed by the Supreme Court of Kentucky on June 13, 1985. In its opinion, the Supreme Court of Kentucky declined to depart from the decision in *Swain* v. *Alabama,* 380 U. S. 202 (1965). April 30, 1986, this Court overruled *Swain* in *Batson* v. *Kentucky,* 476 U. S. ——, 106 S. Ct. 1712 (1986). June 2,

1986, certiorari was granted herein to consider whether *Batson* should be applied to cases still pending on direct review.

SUMMARY OF ARGUMENT

Certiorari was granted in this case to consider whether the holding in *Batson* v. *Kentucky, supra,* should be applied retroactively to convictions which had not become final by the date of the *Batson* opinion. At the time of the *Batson* opinion, petitioner's petition for certiorari was still pending in this Court. Subsequent to the grant of certiorari in this case, the Court ruled in *Allen* v. *Hardy,* 476 U. S. ——, 106 S. Ct. 2878 (1986), that *Batson* will not be applied retroactively to cases on collateral review. Respondent submits that *Batson* likewise should not be applied retroactively to appeals which are not final. Respondent believes that *Shea* v. *Louisiana,* 470 U. S. ——, 105 S. Ct. 1065 (1985), established by necessary implication a new retroactivity rule for all nonfinal appeals. Under *Shea,* new rules of criminal procedure derived from the Constitution will be applied to all nonfinal convictions unless the situation was clearly controlled by existing retroactivity precedents to the contrary. In so holding, the Court merely broadened the applicability of the holding in *United States* v. *Johnson,* 457 U. S. 537 (1982). *Johnson* had been limited to Fourth Amendment cases. The Court in *Shea* concluded there was nothing about the *Johnson* formula that made it more appropriate for a Fourth Amendment claim than a Fifth Amendment claim, and therefore applied the

Johnson rule to find *Edwards* v. *Arizona,* 451 U. S. 477 (1981), retroactive to cases pending on direct appeal. The retroactivity issue is not determined by the provision of the Constitution on which a new constitutional rule of procedure is based. *Johnson* v. *New Jersey,* 384 U. S. 719 (1966). Accordingly, the *United States* v. *Johnson* analysis of retroactivity applies as well to the equal protection rule established in *Batson.*

United States v. *Johnson, supra,* reanalyzed past precedent and determined that a new rule which makes a clear break in the law is preordained to be found nonretroactive. This Court already observed in *Allen* v. *Hardy* that "(t)he rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. *United States* v. *Johnson* defined a clear break case as, *inter alia,* a decision that explicitly overrules past precedent. *Batson* overruled *Swain* v. *Alabama,* 380 U. S. 202 (1965). *Allen* v. *Hardy,* 106 S. Ct. at 2880. *Batson* is plainly a clear break case which under the *Johnson* analysis is not retroactive to cases pending on direct review.

Consideration of past retroactivity precedents preserved by the *Johnson* decision likewise indicates that *Batson* should not be retroactive. *De Stefano* v. *Woods,* 392 U. S. 631 (1968), found the right to a trial by jury for serious crimes and the same right for serious criminal contempts to be nonretroactive. Likewise, *Daniel* v. *Louisiana,* 419 U. S. 522 (1975), found *Taylor* v. *Louisiana,* 419 U. S. 522 (1975) to be nonretroactive. *Taylor* involved the unconstitutional exclusion of women from jury pools by use of an exemption provi-

sion. The *Daniel* court found the retroactivity of *Taylor* to be controlled by the decision in *De Stefano* v. *Woods, supra.*

Petitioner argues that application of the retrospectivity criteria stated in *Stovall* v. *Denno,* 388 U. S. 293 (1967), result in a finding that *Batson* should be retroactive on direct review. Respondent does not believe the *Stovall* criteria are applicable. Even if they are, this Court correctly ruled in *Allen* v. *Hardy,* 476 U. S. ——, 106 S. Ct. 2878 (1986), that the *Stovall* analysis does not warrant retrospective application of *Batson* on collateral review. Respondent submits the same conclusion applies on direct review.

Finally, respondent urges that the Court decline petitioner's invitation to overrule existing retroactivity precedents and adopt Justice Harlan's views in full as expressed in his opinions in *Desist* v. *United States,* 394 U. S. 244 (1969), and in *Mackey* v. *United States,* 401 U. S. 667 (1971). The Harlan approach does not reflect the legitimate concerns which underlie the doctrine of nonretroactivity, namely, justifiable reliance on past law and adverse impact on the administration of justice. Accordingly, the Harlan approach, which has never been adopted by this Court, is not a desirable approach to retroactivity.

ARGUMENT

I. Retrospective Application of a Constitutional Decision to Nonfinal Criminal Convictions Is Governed by the Analysis Employed in (1965), in *United States* v. *Johnson.*

In *Linkletter* v. *Walker,* 381 U. S. 618 (1965) this Court began examining the issue of retrospective application of its decisions announcing new procedural rules for criminal cases derived from the Federal Constitution. The Court noted the development of retrospectivity in civil cases based on the concern that "... judicial repeal oftime did 'work hardship to those who [had] trusted to its existence.' " 381 U. S. at 624. The Court held the rule of *Mapp* v. *Ohio,* applying the exclusionary rule of *Weeks* v. *United States* to the states, not to apply retroactively to cases on collateral review. The Court decided to approach the question on a case-by-case basis, looking to the purpose of the new rule, the reliance placed on prior law, and the effect on the administration of justice of retrospective application of the new rule. 381 U. S. at 636.

This basic approach was restated in and became known as the rule of *Stovall* v. *Denno,* 388 U. S. 293 (1967):

> "These cases establish the principle that in criminal litigation concerning constitutional claims, 'the court may in the interest of justice make the rule prospective . . . where the exigencies of the situation require such an application'. . . ." [citation omitted]. The criteria guiding resolution of the question implicate (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards. 388 U.S. at 296, 297.

Stovall held that the right to counsel during pretrial identifications established in *United States* v. *Wade*

and *Gilbert* v. *California* would not be applied retroactively. The *Stovall* court found no reason to distinguish between direct appeals and collateral proceedings in this regard. The Court in *Stovall* was not troubled by the fact that Wade and Gilbert would be the only defendants to benefit retrospectively from the new rule. This anomaly was deemed an unavoidable consequence of the necessity that constitutional decisions not stand as mere dictum. Also, the Court observed that this possible benefit to parties to a case gave counsel an incentive to advance contentions requiring a change in the law.

United States v. *Johnson*, 457 U. S. 537 (1982), marked a significant change in the retroactivity analysis employed by this Court for its constitutional rulings in criminal cases. The analysis used in *Stovall* v. *Denno*, *supra*, and relied on in many other cases, was replaced in *Johnson*, *supra*, with a rule borrowed in part from Justice Harlan's opinions in *Mackey* v. *United States*, 401 U. S. 667 (1971), and in *Desist* v. *United States*, 394 U. S. 244 (1969). Mr. Justice Harlan came to advocate the retrospective application of new constitutional rulings to all criminal cases that have not yet become "final".[1] Conversely, he advocated that such new rules of criminal procedure should only on the rarest occasions be applied to collateral

[1]Finality in this context means a judgment of conviction has been rendered, the availability of appeal has been exhausted, and the time to petition for certiorari has elapsed or such a petition has been finally denied prior to the date of the new constitutional ruling. *Linkletter* v. *Walker*, *supra*, at 618, 622, n.5.

attacks on criminal judgments. *United States* v. *Johnson* concluded that retroactivity must be rethought. However, the Court determined not to disturb existing retroactivity precedents. 457 U. S. 540, 554. Furthermore, the *Johnson* Court adopted a threshold test based on three categories of cases it believed had not really been governed by the *Stovall* test. The new *Johnson* rule favoring retroactive application of new decisions to nonfinal cases was only applied in *Johnson* because the new decision at issue, *Payton* v. *New York*, 445 U. S. 573 (1980), did not fall into any one of the following three threshold categories.

First, when a decision of this Court merely applies settled precedents to new facts, the new case has applies retroactively to earlier cases, as there is no real change in the law. Second, full retroactivity is necessary when it is determined a trial court lacked authority to convict or punish a defendant. Third, when the Court declares a rule of criminal procedure a clear break with the past, nonretroactivity is effectively preordained. 457 U. S. at 553, 554, 558. In addition to these limitations on the adoption of Justice Harlan's formula, *Johnson* was limited to cases arising under the Fourth Amendment. The question of retrospectivity on collateral review cases was also left to another day. 457 U.S. at 562.

The next significant retroactivity case, *Solem* v. *Stumes*, 465 U. S. 638 (1984), concerned a postconviction proceeding in which it was claimed that the prophylactic Fifth Amendment rule of *Edwards* v.

Arizona, 451 U. S. 477 (1981), should be applied retroactively. In *Solem*, the Court restated the *Johnson* rule as follows:

> "Johnson held that a decision construing the Fourth Amendment that was not a 'clear break with the past' is to be applied to all convictions not yet final when the decision was handed down." 104 S. Ct. at 1341.

The *Solem* Court declined to follow *Johnson* since *Solem* was controlled by prior precedent, involved collateral as opposed to direct review, and did not involve the Fourth Amendment. The Court in *Solem* simply applied the previous *Stovall* analysis to conclude that *Edwards* should not be applied retroactively on collateral review.

Shea v. *Louisiana*, 470 U. S. —, 105 S. Ct. 1065 (1985), was another Fifth Amendment case concerning the retroactive application of *Edwards* v. *Arizona*, 451 U. S. 477 (1981), to a case not yet final at the time *Edwards* was decided. The *Shea* Court held that *Edwards* would apply retroactively to all cases pending on direct appeal, adopting the reasoning of *United States* v. *Johnson*, *supra*. The *Shea* Court noted that while *Johnson*, *supra*, was limited to Fourth Amendment cases, there is nothing about the *Johnson* analysis that makes it more appropriate for a Fourth Amendment rule than a Fifth Amendment rule. Accordingly, *Edwards* was deemed to apply to all cases still pending on direct review. The *Shea* Court declined to specifically rule on the clear break exception in the

Fifth Amendment context, as *Edwards* was "not the kind of clear break with the past that is automatically nonretroactive." *Solem* v. *Stumes*, *supra*, at 647.

Allen v. *Hardy*, 476 U. S., —, 106 S. Ct. 2878 (1986), held in a per curiam opinion that the new rule announced in *Batson* v. *Kentucky*, *supra*, does not apply retroactively when the issue is raised in a post conviction proceeding. The Court in *Allen* expressed no opinion concerning the retroactivity of *Batson* when the issue is raised via direct appeal. As in *Solem* v. *Stumes*, *supra*, the Court in *Allen* applied the *Stovall* v. *Denno* analysis to determine that *Batson* would not be applied retroactively to postconviction cases.

The foregoing authorities suggest that two retroactivity formulas apply to criminal cases, one for nonfinal convictions and another for postconviction proceedings. The upshot of *Shea*, *supra*, is that the *Johnson* retroactivity analysis now expressly applies to nonfinal cases concerning new constitutional rules implementing both the Fourth and Fifth Amendments. However, there is nothing about the *Johnson* analysis that weds it to any particular constitutional right, as pointed out in *Shea*. Therefore, it may reasonably be supposed that the *Johnson* analysis likewise applies to the equal protection issue decided in *Batson* v. *Kentucky*, 106 S. Ct. 1712 (1986). Indeed, in *Pembaur* v. *City of Cincinnati*, 106 S. Ct. 1292 (1986), it was stated without limitation that *Shea* v. *Louisiana*, *supra*, created a distinction between retroactivity on direct review and on collateral attack of a conviction. (JJ.

Powell, Rehnquist, and the Chief Justice, dissenting.) Accordingly, it appears that the retroactivity of *Batson* to nonfinal cases is to be decided by reference to the analysis employed in *United States* v. *Johnson*, *supra*.

II. The Holding of *Batson* Constitutes a Clear Break With the Past and Prospectively Is Therefore Preordained by This Court's Decisions.

Application of the retroactivity analysis of *United States* v. *Johnson*, 457 U. S. 537 (1982), to this case requires examination of previous retroactivity precedents to determine if *Batson* is exempt from *Johnson's* preference for retroactivity. This was done in *Johnson* by consideration of *Johnson's* "threshold test." One prong of that test is whether a new rule of criminal procedure constitutes a "clear break with the past." *Johnson* notes that such rules have almost invariably been found to be nonretroactive. *Johnson*, *supra*, 457 U. S. at 549. *Johnson* concludes that a determination that a rule is a clear break in the law effectively preordains nonretroactivity. 457 U. S. 553, 554, 558. This Court has already decided in *Allen* v. *Hardy*, 476 U. S. —, 106 S. Ct. 2878 (1986), that "[t]he rule in *Batson* v. *Kentucky* is an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. This ruling in *Allen* v. *Hardy* was absolutely correct and warrants denial of retroactive effect to cases raising the Batson issue on direct review.

United States v. *Johnson* rejected the contention that *Payton* v. *New York*, 445 U. S. 573 (1980), constituted a "clear break" in the law, noting the question in *Payton* had been expressly left open in prior cases, and was not an unanticipated rule of law. The *Johnson* Court defined a sharp break in the law as when a decision explicitly overrules a past precedent, disapproves a practice the Supreme Court has arguably sanctioned, or when a longstanding and widespread practice to which this Court has not spoken, but which nearly all lower courts have approved, is overturned. (457 U. S. at 551.)

Batson v. *Kentucky* obviously comes within this definition of a sharp break in the law. It explicitly overruled *Swain* v. *Alabama*, 380 U. S. 202 (1965), a precedent which had been widely relied on for more than twenty years. In *Swain*, this Court rejected a claim that it was a violation of the Fourteenth Amendment for the prosecutor to strike all blacks from the venire through the use of peremptory challenges in a trial of a black man. In Part II of the *Swain* opinion, it is said:

> "Alabama contends that its system of peremptory strikes—challenges without cause, without explanation and without judicial scrutiny — affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial. *This system*, it is said, *in and of itself, provides justification for striking any group of otherwise qualified jurors in any given case, whether they be Negroes, Catholics, accountants or those with blue eyes.* Based on the history of this system and its actual use and operation in

this country, *we think there is merit in this position.* (380 U. S. 211-212.) (Emphasis added.)

* * *

"While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. [Citation omitted]. It is often exercisable upon the 'sudden impressions and unaccountable prejudices we are apt to conceive upon the bare looks and gestures of another,' [Citation omitted] upon a jurior's habits and associations,' [Citation omitted] or upon the feeling that 'the bare questioning [a juror's] indifference may sometimes provoke a resentment.' [Citation omitted.] It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.

* * *

"With these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and White, Protestant and Catholic, are alike subject to being challenged without cause. *To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail*

a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being open to examination, either at the time of the challenge or at a hearing afterwards. The prosecutor's judgment underlying each challenge would be subject to scrutiny for reasonableness and sincerity. *And a great many uses of the challenge would be banned.*

"In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. *The presumption is not overcome* and the prosecutor therefore subjected to examination *by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes.* Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case." (380 U. S. 220, 221, 222) (Emphasis added).

Thus, *Swain* clearly held in Part II thereof that if a prosecutor decided to strike all blacks from a venire based on the circumstances of a particular case involving a black defendant, it was not a violation of the Equal Protection Clause of the Fourteenth Amend-

ment to do so. This was true even if the prosecutor struck black prospective jurors simply because they were black. It was inherent in the nature of the peremptory challenge that ". . . Negro and white, Protestant and Catholic, are alike subject to being challenged without cause."

Batson overruled *Swain* in this regard, abolishing the peremptory nature of the peremptory challenge for a certain class of trials. *Batson,* 106 S. Ct. at 1723. *Batson* was not, as petitioner's brief contends, merely a modification of the standard of proof necessary to prove an equal protection claim. *Batson* was a clash of competing legal principles affecting trials, namely, the equal protection claims of black defendants versus the system of peremptory challenges. The result of this clash was the overruling of *Swain* v. *Alabama's* holding that a prosecutor may strike blacks in particular cases on account of their race:

> "Although a prosecutor ordinarily is entitled to exercise permitted peremptory challenges 'for any reason at all, so long as that reason is related to his view concerning the outcome' of the case to be tried, [citation omitted] the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

Batson, 106 S. Ct. at 1718, 1719. This overruling of *Swain, Batson,* 106 S. Ct. at 1725, fn. 25, was not due to application of evolving burden of proof standards

in jury venire or Title VII cases. It was simply a reassessment of the conflicting interests of equal protection and the peremptory challenge system. The "case after case" proof requirement of *Swain* was not merely an evidentiary formulation. It was based on the ruling that exercise of peremptories on the basis of racial affiliation could be constitutional in particular cases. *Batson* v. *Kentucky,* (Rehnquist, J., dissenting) 106 S. Ct. at 1743.

This reading of *Batson* demonstrates that *Batson* indeed was ". . . an avulsive change which caused the current of the law thereafter to flow between new banks." *Hanover Shoe* v. *United Shoe Machinery Corp.,* 392 U. S. 481 (1968). *Swain* approved of the use of peremptories that *Batson* attempts to outlaw. If *Batson* is not a "clear break" case, respondent doubts another will ever be found. However, even if, as petitioner argues, *Batson* simply concerned a change in the evidentiary burden of proof placed on a criminal defendant claiming denial of equal protection through the state's use of peremptory challenges, the result is the same. No prosecutor or judge could have reasonably anticipated that this Court would resolve the competing interests of equal protection and the peremptory challenge by adopting the particular procedural rules created in *Batson.* Accordingly, *Batson* is obviously a clear break case whether the case is deemed to merely be a change in evidentiary rules or also to be a change in the permissible uses of peremptory challenges.

Desist v. *United States*, 394 U. S. 244 (1969), held that *Katz* v. *United States*, 389 U. S. 347 (1967), which ruled electronic eavesdropping to constitute a search subject to the Fourth Amendment, was not retroactive. "However clearly our holding in *Katz* may have been foreshadowed, it was a clear break with the past, and we are thus compelled to decide whether its application should be limited to the future." 394 U. S. at 248. See, also, *Williams* v. *United States*, 401 U. S. 646 (1971), which declined to find *Chimel* v. *California*, 395 U. S. 752 (1969), retroactive. *Chimel* overruled precedents on the scope of a search incident to arrest which had long been suspect in light of subsequent cases.

Solem v. *Stumes*, 465 U. S. 638 (1984), reiterated that even when a precedent is disreputable in light of other decisions, authorities are entitled to rely on such a precedent, whose overruling would still be a "clear break" in the law. 465 U. S. at 646, fn. 6. Thus, petitioner's apparent claim that *Batson* was foreshadowed by other equal protection decisions since *Swain* is of no moment, even if it is true.

Johnson v. *New Jersey*, 384 U. S. 719 (1966), which held *Miranda* and *Escobedo* to be nonretroactive, likewise emphasizesd the importance of the fact that these decisions overruled prior Supreme Court cases. In light of such overrulings, the reliance interests of law enforcement officers and courts and the resulting effect on the administration of justice counseled strongly in favor of nonretroactivity. Police, prosecutors, and

judges were not required to anticipate the *Miranda* decision based on the previous decision in *Escobedo*.

In summary, petitioner has done nothing to show that this Court erred in describing the *Batson* decision in *Allen* v. *Hardy* as ". . . an explicit and substantial break with prior precedent." 106 S. Ct. at 2880. Accordingly, *United States* v. *Johnson*, *supra*, as extended by *Shea* v. *Louisiana*, *supra*, requires that the new *Batson* rule should not be applied to nonfinal cases tried prior to the date of the *Batson* decision.

III. Retroactivity of Batson Is Also Controlled by the Precedents Established in *Daniel* v. *Louisiana* and *Destefano* v. *Woods*.

In rethinking retroactivity, the majority in *United States* v. *Johnson*, *supra*, was careful to preserve existing retroactivity precedents. Two prior cases involving the nature of the jury were *DeStefano* v. *Woods*, 392 U. S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U. S. 31 (1975). *DeStefano*, *supra*, concerned the retroactivity of *Duncan* v. *Louisiana*, which held that states cannot deny the right to jury trials in serious criminal cases, and *Bloom* v. *Illinois*, which applied the right to a jury trial to serious criminal contempts. *DeStefano* repeated the observation in *Duncan* that "[w]e would not assert, however, that every criminal trial—or any particular trial—held before a judge alone is unfair or that a defendant may never be as fairly treated by a judge alone as he would be by a jury." 392 U. S. 633, 634. Applying the *Stovall* v. *Denno* criteria, the right to a jury trial in these contexts was found to be non-

retroactive.[2] If total elimination of the right to a jury trial did not provoke a finding of retrospectivity, it is difficult to see how the rule of *Batson* could warrant retrospective application. *Batson* will at most accomplish a minor change in jury composition. *DeStefano* is clear precedent warranting prospective application of *Batson*.

Daniel v. *Louisiana, supra,* is even closer factually to the situation in *Batson*. *Daniel* held that *Taylor* v. *Louisiana,* 419 U. S. 522 (1975), was not retroactive to trials conducted prior to the date of the *Taylor* decision. *Taylor* found a state exemption provision excluded women from jury venires in violation of the Sixth Amendment right to trial by an impartial jury drawn from a fair cross section of the community. What was said in *Daniel* about the considerations affecting the retroactivity of *Taylor* is equally compelling in the case at bar:

> In Taylor, as in Duncan, we were concerned generally with the function played by the jury in our system of criminal justice, more specifically the function of preventing arbitrariness and repression. In Taylor, as in Duncan, our decision did not rest on the premise that every criminal trial, or any particular trial, was necessarily unfair because it was not conducted in accordance with what we determined to be the requirements of the Sixth Amendment. In Taylor, as in Duncan, the reliance of law enforcement officials and state legislatures on prior decisions of this Court, such as Hoyt v. Florida, 368 U. S. 57, 7 L. Ed. 2d 118, 82 S. Ct. 159 (1961), in structuring their criminal justice systems is clear. Here, as in Duncan, the requirement of retrying a significant number of persons were Taylor to be held retroactive would do little, if anything, to vindicate the Sixth Amendment interest at stake and would have a substantial impact on the administration of criminal justice in Louisiana and in other States whose past procedures have not produced jury venires that comport with the requirement enunciated in Taylor." 420 U. S. 32, 33.

[2] Of course, application of the Sixth Amendment jury trial right to the states also meets the "clear break" standard of *United States* v. *Johnson, supra.*

The Court in *Daniel* said ". . . the retroactive application of Taylor is clearly controlled by our decision in *DeStefano* v. *Woods*. . . ." Although the case at bar is an equal protection case rather than a Sixth Amendment case, the result is still controlled by *Daniel, supra,* as *Batson* is likewise a new rule concerning proper jury composition.

Brown v. *Louisiana,* 447 U. S. 323 (1980), does not support a different result. *Brown* concerned retrospective application of *Burch* v. *Louisiana,* 441 U. S. 130 (1979), which held that a nonunanimous six-person jury violated the Sixth Amendment right to a jury trial for serious criminal offenses. The Court ordered that *Burch* would be applied retroactively to cases pending on direct appeal. However, there was no majority opinion. The plurality opinion noted that *Burch* was not a clear break in the law, but instead struck down a provision of dubious constitutionality. Burch did not overrule any prior decision or invalidate

a practice of heretofore unquestioned legitimacy. 447 U. S. at 335. Consequently, the reliance interests of the states were not as great as in clear break cases. Moreover, the Burch rule was based on constitutional jury size and unanimity limits which necessarily go to the heart of the truth-finding function. The *Burch* rule was said to be designed to preserve the substance of the jury trial right and assure the reliability of jury verdicts. Since the purpose of the rule went to the heart of the truth-finding function and clearly favored retroactivity, the reliance interests of states and the impact on administration of justice were clearly outweighed.

The *Bateon* rule is far different in that it serves multiple ends and was not intended to have such a substantial impact on the reliability of verdicts. The Court had to engage in line-drawing in *Burch* and assumed juries below its size requirements were unreliable. No such assumption applies in *Batson*. Hence, *Brown* v. *Louisiana, supra*, is not authority for retroactive application of *Batson*.

IV. If the *Stovall* v. *Denno* Formula Still Controls Retrospective Application of Equal Protection Rules to Nonfinal Appeals, Then This Court Decided the Issue Correctly in *Allen* v. *Hardy*.

Respondent has shown that *United States* v. *Johnson's* formula for retroactivity compels a finding that *Batson* is not applicable to other cases pending on direct review at the time of the *Batson* decision. Respondent has assumed from the language in *Shea* v.

Louisiana, 470 U. S. ——, 105 S. Ct. 1065 (1985), that the *Johnson* standard is now applicable to direct appeals regardless of the constitutional provision involved in a new criminal procedure ruling of this Court. If respondent is wrong in extending the *Johnson* reasoning to the equal protection claim in the case at bar, then authority prior and subsequent to *Johnson* indicates the retrospectivity formula of *Stovall* v. *Denno*, 388 U. S. 293 (1967), controls this case. *See, e.g., Solem* v. *Stumes*, 465 U. S. 638 (1984). Of course, this Court has already ruled in *Allen* v. *Hardy*, 476 U. S. ——, 106 S. Ct. 2878 (1986), that application of the *Stovall* criteria results in a conclusion that *Batson* is not retroactive. Petitioner has shown nothing that warrants a reconsideration of this ruling. The *Stovall* test weighs three factors. They are the purpose to be served by the new standards, the extent of the reliance by law enforcement authorities on the old standards, and the effect on the administration of justice of a retroactive application of the new standards. *Allen* v. *Hardy*, 106 S. Ct. at 2880. *Allen* notes that a decision announcing a new standard is almost automatically nonretroactive where the decision is a clear break with past precedent, citing *Solem* v. *Stumes, supra*. *Allen* likewise notes that "... the rule in Batson v. Kentucky is an explicit and substantial break with prior precedent." Concerning the first *Stovall* factor, the purpose to be served by the new rule, Allen notes that retroactive effect is appr iate where the new constitutional principle is designed to enhance the accuracy of criminal trials. However, the fact that a rule may have some impact on

the accuracy of a trial does not compel a finding of retroactivity. "The question whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact-finding process at trial is necessarily a matter of degree." *Johnson* v. *New Jersey*, 384 U. S. 719, 728-729 (1966). *Allen* notes that the purpose to be served by the rule weighs in favor of retroactivity where the standard goes to the heart of the truth-finding function. *Batson* is not such a case, as is shown above by the comparison with *DeStefano* v. *Woods*, 392 U .S. 631 (1968), and *Daniel* v. *Louisiana*, 420 U. S. 31 (1975). *See, also, Johnson* v. *New Jersey*, 384 U. S. 719 (1966) (*Miranda* v. *Arizona* and *Escobedo* v. *Illinois* nonretroactive); *Stovall* v. *Denno*, 388 U. S. 293 (1967) (right to counsel during pretrial identifications nonretroactive); *Tehan* v. *Shott*, 382 U. S. 406 (1966) (prohibition of comment on accused's failure to testify nonretroactive). *Stovall* v. *Denno*, *supra*, noted the fundamental difference distinguishing it from prior cases applied retroactively:

> "But the certainty and frequency with which we can say in the confrontation cases that no injustice occurred differs greatly enough from the cases involving absence of counsel at trial or on appeal to justify treating the situations as different in kind for the purpose of retroactive application . . ." (388 U. S. at 299.)

Batson likewise is different in kind from cases such as *Gideon* v. *Wainwright*, 372 U. S. 335 (1963), and *Jackson* v. *Denno*, 378 U. S. 368 (1964), which have been

said to go to the heart of the truth-finding process. *Stovall, supra*, 388 U. S. 297, 298.

Allen recognized that ". . . the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well." 106 S. Ct. at 2880. The purposes of the *Batson* rule include ensuring that states do not discriminate against citizens summoned to judge a member of their own race and strengthening public confidence in the administration of justice as well as serving an accused's interest in neutral jury selection procedures.

Rules which serve multiple ends do not go to the heart of the truthfinding function and are unlikely to be given retroactive effect. See *Tehan* v. *Shott, supra*, *Johnson* v. *New Jersey, supra*, *Gosa* v. *Mayden*, 413 U. S. 665 (1973). The Court in *Allen, supra*, further notes that the *Batson* rule joins other procedures that protect a defendant's interest in a neutral factfinder, such as voir dire and jury instructions. "Those other mechanisms existed prior to our decision in Batson, creating a high probability that the individual jurors seated in a particular case were free from bias. Accordingly, we cannot say that the new rule has such a fundamental impact on the integrity of factfinding as to compel retroactive application." 106 S. Ct. at 2881. Petitioner has not shown any reason to disturb this finding.

While the first *Stovall* factor does not weigh in favor of retroactivity, *Allen* noted that the second and third *Stovall* factors do weigh heavily in favor of nonretroactive application of *Batson*. Retroactive appli-

cation of *Batson* to direct appeals would provoke reversals of convictions in two types of cases. It would affect cases in which a prosecutor in good-faith reliance on *Swain* attempted to select the jurors least likely to be biased against the state in a particular case in violation of the new equal protection ruling of *Batson*. *Batson* would equally affect cases in which a prima facie case of exercise of peremptories on the basis of race would be found despite the fact that the prosecutor exercised his peremptories for other reasons. The prosecutor would not likely be able to reconstruct what happened during a voir dire years earlier, and a trial judge would be unable to take into account many relevant factors at a retrospective hearing on a *Batson* claim. With respect to reliance on the *Swain* rule, *Allen* held:

> "There is no question that prosecutors, trial judges and appellate courts throughout our state and federal systems justifiably have relied on the standard of Swain." 106 S. Ct. at 2881.

The extent of reliance on *Swain* is noted in the *Batson* opinion. 106 S. Ct. 1714, fn. 1. Reliance on *Swain* is also cataloged in *Annot: Use of Peremptory Challenges to Exclude from Jury Persons Belonging to a Class or Race*, 79 A.L.R. 3d 14, 18, citing nearly two hundred cases supporting respondent's interpretation of *Swain* v. *Alabama*. Even the amicus brief the NAACP Legal Defense and Educational Fund, Inc., et al. in the earlier *Batson* case admitted that a prosecutor conscientiously desiring to obey the Constitution could reasonably have viewed *Swain* as allowing peremptory challenges of

blacks *qua* blacks in particular cases. (Brief Amici Curiae of the NAACP Legal Defense and Educational Fund, Inc., et al., No. 84-6263, pp. 48-49.)

Contrary to petitioner's argument, there was no reason for a prosecutor to make any records concerning the race of jurors peremptorily challenged or the reasons for such challenges unless it appeared that no blacks were being selected ". . . in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be. . . ." *Swain, supra,* 380 U. S. at 223. Consequently, it will be impossible in virtually every case to reconstruct the record that *Batson* held is required to rebut a prima facie case of discrimination against veniremen on the basis of race. "Under these circumstances, the reliance interest of law enforcement officials is 'compelling' and supports a decision that the new rule should not be retroactive. *Solem* v. *Stumes, supra* at 650." *Allen, supra,* 106 S. Ct. at 2881.

The impact on the administration of justice of retroactive application of *Batson* to direct appeals, while less severely disruptive than the impact on final convictions, would be substantial. What was said in *Allen* holds equally true for direct appeals:

> "Retroactive application would require trial courts to hold hearings, often years after the conviction became final, to determine whether the defendant's proof concerning the prosecutor's exercise of challenges established a prima facie case of discrimination. Where a defendant made out a prima facie case, the court then would be re-

quired to ask the prosecutor to explain his reasons for the challenges, a task that would be impossible in virtually every case since the prosecutor, relying on Swain, would have had no reason to think such an explanation would someday be necessary. Many final convictions therefore would be vacated, with retrial 'hampered by problems of lost evidence, faulty memory, and missing witnesses.' Solem v. Stumes, supra, at 650; see also Linkletter Walker, 381 U. S. at 637." 106 S. Ct. at 2881.

There is no way to determine the number of convictions that may be set aside by the retroactive application of the *Batson* rule to nonfinal appeals. The number would certainly be significant and would be an unacceptable cost of a rule that does not go to the heart of the truthfinding function. The weighing of the *Stovall* factors has resulted in a conclusion that *Batson* should not be applied retroactively on federal habeas corpus review. The same denial of retroactivity must result if the *Stovall* factors govern retroactive application of *Batson* to direct appeals. The distinction between direct appeal and collateral attack has no bearing on the purpose of the new rule, the most important factor in the *Stovall* analysis. Likewise, there is no distinction in the reasonableness of reliance on the prior rule based on the type of review involved. The only difference concerning *Batson's* possible impact on the administration of justice is that the number of cases on direct review is significant but smaller than the number of cases on collateral attack. None of the *Stovall* factors favor retroactive application of

the *Batson* rule to direct appeals. Accordingly, if the *Stovall* test applies to this case, the result must be the same as the result of the *Stovall* test in *Allen* v. *Hardy*, 476 U. S. ___, 106 S. Ct. 2878 (1986).

V. This Court Should Decline Petitioner's Invitation to Overrule *United States* v. *Johnson* and to Apply New Constitutional Rules to All Nonfinal Criminal Appeals.

Respondent has shown that under the governing retroactivity formula first adopted in *United States* v. *Johnson*, 457 U. S. 537 (1982), *Batson* should not apply to nonfinal convictions in which the jury was sworn prior to the date of the Batson opinion. Respondent has likewise shown that if the *Johnson* formula does not apply to this case, the former retroactivity rule employed in *Stovall* v. *Denno*, 388 U. S. 293 (1967), yields the same result. The weakness of Petitioner's position under both the *Johnson* and *Stovall* rules is indicated by the prominence in petitioner's brief of his argument that an entirely new retroactivity formula should be adopted by this Court. (Petitioner's Brief at 16.) Petitioner contends new constitutional rules of criminal procedure should apply to every appeal of a nonfinal conviction, as advocated by Justice Harlan. A majority of this Court has never adopted that position.

The motivating force behind the creation of any rule of nonretroactivity was stated in this Court's original foray into this arena in *Linkletter* v. *Walker*, 381 U. S. 618 (1965), as the reliance interests of those

who trusted to the existence of prior law. 381 U. S. at 624.

> "[Chief Justice Hughes] . . . reasoned that the actual existence of the law prior to the determination of unconstitutionality 'is an operative fact and may have consequences which cannot justly be ignored. The past cannot always be erased by a new judicial declaration.' He laid down the rule that the 'effect of the subsequent ruling as to invalidity may have to be considered in various aspects.'" 381 U. S. at 625.

The reliance interest at issue in criminal cases is given considerable weight in the "clear break" exception to retroactivity established in *Johnson* and in the second and third factors employed in the *Stovall* retroactivity test. Justice Harlan's position espoused in his opinions in *Mackey* v. *United States,* 401 U. S. 667 (1971), and in *Desist* v. *United States,* 394 U. S. 244 (1969), give no consideration at all to the reliance interests of the government or to the effect on the administration of justice of retroactive application of new rules of criminal procedure to appeals from non-final convictions. Instead, the Harlan approach defines all direct appeals as part of the same "class" and seeks to cure a perceived inequity by making new constitutional rules applicable to all members of the defined class. Under the Harlan rule, two codefendants could be convicted in a joint trial. One conviction could be overturned on direct appeal due to a new constitutional rule while the other defendant's appeal

may become final in the interim, depriving the second defendant of the benefit of the new rule. The reliance interest of the state in the prior law is identical, as are the interests of the defendants in this example in whatever the purpose of the new constitutional rule may be. Yet, the retroactivity outcome is different. The Harlan approach is simply not related to the interests affecting the retroactivity question. It focuses on concerns that are not central to the retroactivity issue, but only incidental thereto. Therefore, it does not present a desirable rule for resolution of the retroactivity problem. See the dissenting opinions of Justice White in *United States* v. *Johnson,* 457 U. S. 537, 564 (1982), and *Shea* v. *Louisiana,* 470 U. S. ——, 105 S. Ct. 1065, 84 L. Ed. 2d at 51 (1985). Petitioner's invitation to adopt the Harlan approach in toto should be declined.

CONCLUSION

The decision of the Supreme Court of Kentucky affirming petitioner's conviction for robbery in the first degree and for being a persistent felony offender in the second degree should be affirmed.

Respectfully submitted,

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Nos. 85-5221 & 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH,
Petitioner,

v.

COMMONWEALTH OF KENTUCKY,
Respondent.

WILLIE DAVIS BROWN
a/k/a WILL BROWN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent,

On Writs of Certiorari to the Supreme Court of Kentucky and the Court of Appeals for the Tenth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, INC.

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MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Criminal Defense Lawyers, Inc. (NACDL) respectfully moves the Court, pursuant to Rule 36.3, for leave to file the attached brief as amicus curiae in support of the Petitioners.

Petitioners have consented to the filing; Respondent, State of Kentucky, has consented; Respondent, United States of America, has consented but no written consent has been received to date.

The NACDL is a District of Columbia non-profit corporation with a membership comprised of approximately four thousand lawyers, including representatives from every state.

NACDL was founded twenty-eight years ago to promote study and research in the field of criminal law, to disseminate and

advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

An integral part of the proper administration of criminal justice is the application of principles and procedures announced by the Court to cases other than that before the Court at that particular time. At present the question of when the Court's decisions will apply to other cases is difficult to answer. The issue of retroactivity has been addressed by the Court on numerous occasions, but no line has been drawn by which to judge whether a

ruling is retroactive or not. A clear answer is needed on the issue to provide the guidance needed by the lower courts and counsel to administer the criminal justice system properly. The NACDL wishes to file this brief to suggest that these cases present an appropriate opportunity to resolve the issue of retroactivity and to do so in favor of Petitioners.

Respectfully submitted,

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ATTORNEY FOR AMICUS CURIAE

STATEMENT OF INTEREST OF THE AMICUS CURIAE

The NACDL is a District of Columbia non-profit corporation with a membership comprised of approximately four thousand lawyers, including representatives from every state.

NACDL was founded twenty-eight years ago to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the field of criminal defense practice, and to encourage the integrity, independence and expertise of criminal defense lawyers. Among NACDL's stated objectives is the promotion of proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual rights and the improvement of the criminal law, its practices and procedures.

An integral part of the proper administration of criminal justice is the application of principles and procedures announced by the Court to cases other than that before the Court at that particular time. At present the question of when the Court's decisions will apply to other cases is difficult to answer. The issue of retroactivity has been addressed by the Court on numerous occasions, but no line has been drawn by which to judge whether a ruling is retroactive or not. A clear answer is needed on the issue to provide the guidance needed by the lower courts and counsel to administer the criminal justice system properly.

SUMMARY OF ARGUMENT

The cases before the Court present the recurring issue of retroactivity of a prior decision. When the Court ruled in Batson v. Kentucky, ____ U.S. ____, 106 S.Ct. 1712 (1986), Petitioners herein had applied for writs of certiorari on the question of use of peremptory challenges. The Court must now decide whether the procedure clarified in Batson is applicable to convictions not yet final. The NACDL submits that it is.

As early as 1801 the Court recognized that the general rule in reviewing a case on direct appeal is to look to the law as it exists at the time of review. United States v. Schooner Peggy, 1 Cranch 103, 2 L.Ed 49 (1801). In Desist v. United States, 394 U.S. 244 (1969), Justice Harlan, in a dissenting opinion, proposed a view towards the issue of retroactivity

that has since become known as the Harlan approach. The basis of that approach is that application of a new rule of law to cases pending on direct review is necessary to avoid the Court acting as a super-legislature. For the limited purpose of deciding the cases before it, the Court adopted Harlan's reasoning in United States v. Johnson, 457 U.S. 537 (1982) and Shea v. Louisiana, 105 S.Ct. 1065 (1985). Beyond that, the Court has declined to draw the line specifically between cases on direct appeal and those on habeas review, yet such a distinction would be well founded. See: Linkletter v. Walker, 381 U.S. 618 (1965). The scope of review is different at the two levels. Furthermore, the need for finality has long been recognized and the completion of the direct appeal process marks that ending point. See: Shea v. Louisiana, supra.

Petitioners similarly situated should receive the same treatment. Principles of fairness prevail only when all of those whose cases are on appeal feel the effects of a ruling, not just the one whose case was selected for review. Furthermore, justice demands that if a lower court is reversed by the Court for reaching a decision that was wrong, other courts that reach the same decision, if still subject to review, must likewise be reversed. See: U.S. v. Johnson, 457 U.S. 537 (1982); Mackey v. U.S., 401 U.S. 667 (1971) (J. Harlan opinion); Desist v. U.S., 394 U.S. 244 (1969) (J. Harlan dissent).

A R G U M E N T

I. A CLEAR LINE OF RETROACTIVITY IS MANDATED AND JUSTIFIABLE FOR THOSE CASES PENDING ON DIRECT APPEAL.

Retroactivity of judicial decisions is neither compelled nor prohibited by the Federal Constitution. However, "[a]s a rule, judicial decisions apply 'retroactively.'" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338, 1341 (1984), quoting from Robinson v. Neil, 409 U.S. 505, 507-508 (1973). Varying degrees of retroactivity have been established as a result of the innumerable cases in which the Court has addressed the issue. New decisions have been given complete retroactive application to all prior cases or limited application only to those where the judgment is not yet final, or those where the trial has not yet begun.

The difference between the scope of review on direct appeal and collateral review has long been recognized. In U.S. v. Schooner Peggy, 1 Cranch 103, 110 (1801), Chief Justice Marshall wrote:

> It is the general rule that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed or its obligation denied. . . [and] where individual rights... are sacrificed for national purposes. . .the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

With regard to cases on collateral review ("habeas cases"), the Court should apply the constitutional standards that prevailed at the time the original proceeding took place. "[C]orrect application of...

that existing law] is all that is required to 'forc[e] trial and appellate courts... to toe the constitutional mark.' [Mackey v. U.S., 401 U.S. 667 at 687.]" Solem v. Stumes, 465 U.S. 638, 104 S.Ct. 1338 at 1347, (J. Powell concurring). As noted by Justice Powell in his concurrence in Hankerson v. North Carolina, 432 U.S. 233, 248 (1977), such an approach is "more attuned to the historical limitations on habeas corpus." See also: Solem v. Stumes, supra, (J. Powell concurring).

The distinction between direct and collateral review was most recently discussed in Shea v. Louisiana, 105 S.Ct. at 1070, wherein the Court stated:

> The distinction. . .properly rests on considerations of finality in the judicial process. The one litigant already has taken his case through the primary system. The other has not. For the latter, the curtain of finality has not been drawn. Somewhere the closing must come.

It might seem that a dim line has been drawn between cases on direct appeal and on collateral review. However, numerous decisions rendered on the issue of retroactivity have generated "a welter of incompatible rules and inconsistent principles." U.S. v. Johnson, 457 U.S. at 546, quoting from Desist v. U.S., 394 U.S. 244, 258 (J. Harlan dissenting). Even the criteria for determining at what point to draw the line appears to differ according to the stage of litigation of the case at issue. In Stovall v. Denno, 388 U.S. 293, 297 (1967), the Court established the following three factors to consider:

> (a) the purpose to be served by the new standards, (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of new standards.

Those factors were discussed in Solem v. Stumes, 465 U.S. 638 (1984), wherein the Court held that Edwards v. Arizona was not retroactive to cases on collateral review. The Court in Solem also referred to Linkletter v. Walker, 381 U.S. 618 (1965); Tehan v. Shott, 382 U.S. 406 (1966); and Johnson v. New Jersey, 384 U.S. 719 (1969). It is significant that each of those cases arose on collateral review. U.S. v. Johnson, supra, and Shea v. Louisiana, supra, which both came before the Court on direct appeal, addressed different factors. In each, the Harlan approach was employed, calling for application of the decision to all cases that had not reached the end of the appeal process -- finality. Though the Court has never clarified specifically what factors are to be considered in a specific type of case, a review of all of the cases shows that the Stovall v. Denno, supra, factors apply

to cases at the habeas level, whereas the Harlan approach has been applied to cases on direct appeal. This distinction was noted by District of Columbia Court of Appeals in Kirk v. U.S., (No. 85-804, June 5, 1986). Furthermore, the Stovall factors bear more practically on habeas cases because they usually involve long-standing convictions, thus the issues of reliance and effect on the system weigh much heavier.

Two exceptions to the Harlan approach have been recognized. Decisions which indicate a clear break from the past are invariably non-retroactive, and where a new decision bears on the trial court's lack of authority to convict or punish the defendant, it is to be applied retroactively to all cases. If the decision before the Court on the question of retroactivity does not fit into one of those categories

where retroactivity has already been decided, the Harlan general rule is considered.

In the dissents written in Shea v. Louisiana, supra, including one written by Justice Rehnquist, disfavor was expressed over drawing the line between direct appeal and habeas, but with exceptions. Specifically, the exception for "clear break" decisions was questioned. Such an exception does allow for continued inconsistency in the area of retroactivity. There is no definite criteria for determining when a decision marks a clear break from the past. In Solem v. Stumes, the Court held that, while Edwards v. Arizona did create a new "bright-line" rule, it was "not the sort of 'clear break' case that is almost automatically retroactive. 104 S.Ct. at 1343. What distinguishes a "bright-line" new rule from a "clear break"? This question remains unanswered.

It is clear that the time has come to draw a distinct line with respect to retroactivity. Embracing the Harlan approach to cases on direct appeal would make such a mark. Adoption of the approach without the "clear break" exception would clarify the muddy waters that, though lessened, are still muddled with the issue of clear break left open.

II. PRINCIPLES OF FAIRNESS AND JUDICIAL CONSISTENCY MANDATE APPLICATION OF A NEW RULE TO ALL CASES PENDING ON DIRECT REVIEW.

Petitioners' cases were pending before the Court on applications for writ of certiorari when the Court ruled in Batson v. Kentucky, supra. The issue addressed in Batson, the use of peremptory challenges by a prosecutor, had been raised in both applications. Petitioners convictions were not final. Their cases should be reviewed in light of the procedures outlined in Batson.

Justice Harlan based his approach on retroactivity on notions of "principled decision-making and fairness." Shea v. Louisiana, 105 S.Ct. at 1070. He recognized that convictions are not overturned and criminals released from jail because of the Court's desire to do so or because it seems wise. Such action is taken because "the government has offended con-

stitutional principle in the conduct of his case." Desist v. U.S., 394 U.S. at 258. That basic judicial tradition is abandoned when the Court simply picks and chooses one defendant from among several similarly situated and applies the "new" rule only to him. Justice Powell also addressed this problem also in his concurring opinion in Hankerson v. North Carolina, supra. Allowing one lucky individual whose case was chosen to enjoy retroactive application while others like him fell under the old doctrine "hardly comports with the ideal of 'administration of justice with an even hand.'" Id at p. 247, quoting from Desist v. U.S., supra at 255 (J. Douglas dissenting). As noted in Shea v. Louisiana, supra, in the absence of retroactive application, equal justice would prevail only if the "new" rule was confined to prospective application, unavailable even to the defendant whose

case prompted the decision. The petitioner in Batson v. Kentucky enjoys the benefit of that ruling; petitioners BROWN and GRIFFITH must likewise.

If defendants come before the Court with the same issues, justice must be done to each. In accordance with this responsibility, Justice Harlan stated:

> If a "new" constitutional doctrine is truly right, we should not reverse lower courts which have accepted it; nor should we affirm those which have rejected the very argument we have embraced. Anything else would belie the truism that is the task of this Court, like that of any other, to do justice to each litigant on the merits of his own case.

Desist v. U.S., 394 U.S. at 259.

If the lower court in Batson v. Kentucky violated constitutional protection afforded under the Equal Protection Clause, the lower courts in the cases herein committed the same error. The Court, having revers-

ed the lower court in Batson, cannot now affirm decisions which reject the position embraced therein.

The approach proposed by Justice Harlan, adopted by various members of the Court in concurring and dissenting opinions and adopted by the Court for limited purposes in Johnson and Shea, is "closer to the ideal of principled, evenhanded judicial review than is the traditional retroactivity doctrine. Hankerson v. North Carolina, 432 U.S. at 246.

C O N C L U S I O N

Petitioners, who stand in the same position as the lucky beneficiary whose case is chosen for review, should benefit to the same extent as that similarly situated defendant. A clear and concise rule of retroactivity dictates that the same remedy should always apply on direct appeal.

Respectfully submitted,

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ATTORNEY FOR AMICUS CURIAE

(8)

No. 85-5221

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

RANDALL LAMONT GRIFFITH,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

On Writ Of Certiorari To
The Supreme Court Of Kentucky

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

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BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans. During the past 23 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar in addressing the legal

problems of minorities and the poor. The Committee's membership today includes past presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance to our system of justice of having criminal verdicts rendered by juries untainted by racial discrimination, and the widespread perception that prosecutors have exercised peremptory challenges in a discriminatory manner, prompted the Lawyers' Committee to file a brief *amicus curiae* in *Batson v. Kentucky*, 106 S. Ct. 1712 (1986). The same concerns have prompted the Lawyers' Committee to file a brief *amicus curiae* in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner Randall Lamont Griffith, a black man, was convicted by a Kentucky state jury of first degree robbery and second degree persistent felony, based upon his alleged theft of a purse (J.A. 2-3, 7-8). He was sentenced to a term of 20 years' imprisonment (J.A. 7-8). Petitioner was tried approximately three months after the trial of James Kirkland Batson, whose conviction was reviewed by this Court last Term (*see Batson v. Kentucky*, 106 S. Ct. 1712 (1986)); both trials were conducted by the same prosecutor (Br. Opp. 1).

At petitioner's trial, the Commonwealth used four peremptory challenges to remove four of the five black

veniremen (J.A. 12-13).[1] The fifth black venireman was excused by the clerk pursuant to a random procedure prescribed by Kentucky Criminal Rule 9.30 (J.A. 15; Pet. 3). Petitioner interposed a timely objection to the Commonwealth's use of its peremptory challenges and moved to discharge the jury (J.A. 10-16). The Commonwealth gave an explanation for having challenged two of the four black veniremen whom it had excused (J.A. 14). The trial court then overruled petitioner's objection and denied his motion (J.A. 14-16).

The Supreme Court of Kentucky affirmed petitioner's conviction (J.A. 17-18). Ostensibly based on this Court's decision in *Swain v. Alabama*, 380 U.S. 202 (1965), the Kentucky Supreme Court rejected petitioner's Fourteenth Amendment claim, holding "that the striking of all blacks from a jury panel in a particular case is not a denial of equal protection" (J.A. 17-18).

The petition for a writ of certiorari was filed on August 9, 1985. On June 2, 1986, this Court granted certiorari to determine whether the holding in *Batson v. Kentucky* should be applied to cases pending on direct appeal (J.A. 19).[2]

---

[1] The jury was chosen by a "blind strike" system. *See Batson*, 106 S. Ct. at 1715 n.2. One of the blacks struck by the Commonwealth also was struck by petitioner (J.A. 12-13).

[2] In its brief in opposition (Br. Opp. 1), the Commonwealth argued that "[c]ertiorari should be denied in the case at bar since the *Batson* case will provide an adequate vehicle to consider questions relating to allegedly discriminatory exercise of peremptory challenges."

SUMMARY OF ARGUMENT

In this case, the Court must decide whether it will allow prosecutors to rely on *Swain v. Alabama*, 380 U.S. 202 (1965), to immunize discrimination that *Swain* itself condemned. This Court stated the principle of law applicable to this case in *Shea v. Louisiana*, 105 S. Ct. 1065, 1069-70 (1985), in which the Court held that a new constitutional rule must always "be applied to cases pending on direct review" except where "the rule is so clearly a break with the past that prior precedents mandate nonretroactivity." This presumption of retroactivity is mandated by considerations central to the Court's judicial function: "application of a new rule of law to cases pending on direct review is necessary in order for the Court to avoid being in the position of a super-legislature, selecting one of several cases before it to use to announce the new rule and then letting all other similarly situated persons be passed by unaffected and unprotected by the new rule." 105 S. Ct. at 1069 (citations omitted). As the Court explained in *United States v. Johnson*, 457 U.S. 537, 551 (1982), the "clear break" exception is a narrow one which applies only when the Court "disapproves a practice [it] . . . arguably has sanctioned in prior cases." These principles require that the holding in *Batson* be applied to cases pending on direct appeal.

First, the Court's holding in *Batson* does not constitute a "clear break" in the sense of "disapprov[ing] a practice this Court arguably has sanctioned in prior cases." *Johnson*, 457 U.S. at 551. For more than 100 years, since the Court's decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court repeatedly, emphatically, and consistently has condemned the practice of discriminating

against citizens, because of their race, in the context of jury selection. This Court soundly condemned that practice in *Swain v. Alabama*, 380 U.S. 202 (1965), and reiterated that condemnation in *Batson*. Indeed, the exclusion of persons from jury service in state or federal courts, based on their race, has been a federal criminal offense since 1875. *See* 18 U.S.C. § 243 (1982).

By no stretch of the imagination, therefore, could it be asserted that *Swain* permitted what *Batson* condemns. By no stretch of the imagination could it be asserted that prosecutors were entitled, before this Court's decision in *Batson*, to discriminate against criminal defendants and veniremen because of their race. At most, the Court's holding in *Batson* merely altered the means by which a defendant may *prove* discrimination in the jury selection process. That alteration was necessary because the scheme of proof adopted by the lower courts in the years following *Swain* was inconsistent with well-established, general principles of equal protection law, as articulated in numerous decisions of this Court, and because it was ineffective as a means of enforcing the prohibition against discrimination articulated in *Strauder*, *Swain*, and other cases. *See Batson*, 106 S. Ct. at 1720-21, 1724. In *Batson*, the Court broke no ground, either in terms of substantive constitutional principle or in terms of principles of proof. At most, the Court applied well-established principles of proof to an area in which some lower courts had not done so.

Second, even if *Batson* is in some sense a "break" with past precedent, it is not the kind of break that mandates non-retroactivity. For at least four separate reasons, the integrity of the judicial process requires that the Court apply the holding in *Batson* to cases pending on direct appeal. First, as this Court's cases demonstrate, the Court has often applied the holdings of "clear break" cases to

cases pending on direct appeal, where the new rule is designed, as here, to protect the integrity of the judicial system and enhance public confidence in the impartial administration of justice. In such circumstances, the very reasons which warranted adoption of the new rule also mandate its application to pending cases. *See, e.g., Linkletter v. Walker*, 381 U.S. 618 (1965); *Ivan V. v. New York*, 407 U.S. 203 (1972). The other three considerations which compel retroactivity in a case such as this were well described by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 256-69 (1969) (Harlan, J., dissenting), and *Mackey v. United States*, 401 U.S. 667, 675-702 (1971) (Harlan, J., concurring in part). Those considerations are consistency of principle, the need to avoid the rendering of "advisory opinions," and the fundamental judicial duty to treat similar cases in a similar way. *Desist*, 394 U.S. at 258-59. In a case such as *Batson*, where the new rule strikes at an evil close to the heart of the judicial process itself, these four considerations compel retroactivity.

ARGUMENT

I.

THE HOLDING IN *BATSON* MUST BE APPLIED TO CASES PENDING ON DIRECT APPEAL BECAUSE *BATSON* REAFFIRMS PAST PRECEDENT AND DOES NOT COME WITHIN THE "CLEAR BREAK" EXCEPTION.

In *Shea v. Louisiana*, 105 S. Ct. 1065, 1069-70 (1985), this Court concluded that, unless a constitutional rule "is so clearly a break with the past that prior precedents mandate nonretroactivity, [the] . . . new . . . rule . . . [should] be applied to cases pending on direct review when

the rule was adopted." The Court has defined a clear break case as one in which the Court "disapproves a practice [it] . . . arguably has sanctioned in prior cases." *United States v. Johnson*, 457 U.S. 537, 551 (1982).[3] In other words, the new rule must preclude the police or the prosecutor from doing something which they were constitutionally entitled to do before the decision was announced. *See, e.g., Williams v. United States*, 401 U.S. 646 (1971); *Desist v. United States*, 394 U.S. 244 (1969).

The "clear break" exception has no application here because *Batson* established no new principle of constitutional law. As the Court expressly noted in *Batson*, the Constitution has prohibited prosecutors from practicing racial discrimination in jury selection for more than 100 years (106 S. Ct. at 1719). All that *Batson* did was to

[3] In *Allen v. Hardy*, No. 85-6593 (June 30, 1986), this Court held that *Batson* does not apply to cases in which the judgment became final before *Batson* was decided. No inference is to be drawn from the summary disposition in *Allen* because the Court specifically reserved judgment "on the question whether . . . [its] decision in *Batson* should be applied to cases that were pending on direct appeal." Slip op. at 3 n.1. In any event, the holding in *Allen* is not inconsistent with our position in this case because this Court has long distinguished between cases pending on direct appeal and those on collateral attack. *Desist v. United States*, 394 U.S. 244, 260-69 (1969) (Harlan, J., dissenting); *compare Solem v. Stumes*, 465 U.S. 638 (1984), *with Shea v. Louisiana*, 105 S. Ct. 1065 (1985). Moreover, although the *Allen* Court suggested that *Batson* may in some sense be viewed as "an explicit and substantial break with prior precedent" (slip op. at 3), the Court clearly did not find that possible characterization to be dispositive because, in fact, the Court in *Allen* then proceeded to apply the three factors articulated in *Solem v. Stumes* to determine whether *Batson* should be applied to cases on collateral attack (slip op. at 4-6), an analysis which would have been wholly unnecessary if that observation had been controlling. Indeed, as we show below (*see* pages 8-14, *infra*) that observation cannot be controlling in any event because it is inconsistent with the Court's analysis in *Batson* itself.

disapprove a scheme of proof which some lower courts had developed after *Swain*, and to bring the rules of proof in this area into conformity with general principles of Fourteenth Amendment law, as articulated in numerous decisions of this Court. *Batson*, 106 S. Ct. at 1720-24. In this sense, *Batson* reaffirms existing law, and does not depart from it.

A. The Holding In *Batson* Must Be Applied To All Cases Pending On Direct Appeal Because *Batson* Reaffirmed 100 Years Of Precedent And Announced No New Substantive Constitutional Standard.

In *United States v. Johnson*, this Court explained why cases that represent "a clear break with the past" should ordinarily be given only prospective application (457 U.S. at 549-50; citations omitted): "Once the Court has found the new rule was unanticipated, the second and third *Stovall* factors—reliance by law enforcement authorities on the old standards and effect on the administration of justice of a retroactive application of the new rule—have virtually compelled a finding of nonretroactivity." For example, the Court in *Desist* (394 U.S. at 250-51) found it unfair to hold the police to the new "expectation of privacy" standard announced in *Katz v. United States*, 389 U.S. 347 (1967), when they had relied on the old "trespass" standard articulated in *Goldman v. United States*, 316 U.S. 129 (1942), and *Olmstead v. United States*, 277 U.S. 438 (1928).

In *Katz*, the Court announced a new substantive standard of constitutional law. In *Batson*, by contrast, no new substantive constitutional standard was announced. Since the ratification of the Fourteenth Amendment, this Court has consistently and steadfastly refused to sanction racial discrimination in jury selection. *Batson*, 106 S. Ct. at

1719. Indeed, few principles are more well-established in our constitutional jurisprudence. More than 100 years ago, in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court held that the state violates the equal protection clause of the Fourteenth Amendment by trying a defendant before a jury from which the state has excluded blacks. As this Court explicitly recognized in *Batson* (106 S. Ct. at 1719), "[t]he principles announced in *Strauder* never have been questioned in any subsequent decision of this Court."

As it noted in *Batson* (106 S. Ct. at 1719), this Court has repeatedly reaffirmed the principles of *Strauder* and has applied them to particular facts, most significantly, for present purposes, in *Swain v. Alabama*, 380 U.S. 202, 222-24 (1965).[4] Thus, as the Court explained in *Batson*, the *Swain* Court clearly and unequivocally held that "[i]t was impermissible for a prosecutor to use his challenges to exclude blacks from the jury 'for reasons wholly unrelated to the outcome of the particular case on trial' or to deny blacks 'the same right and opportunity to participate in the administration of justice enjoyed by the white population' " (106 S. Ct. at 1720; *quoting Swain*, 380 U.S. at 224). In *Swain*, the Court also held that a defendant could establish a *prima facie* case of purposeful discrimination by showing that the state had systematically excluded blacks from juries (380 U.S. at 222-24). Finally, as Justice

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[4] As the Court noted in *Batson* (106 S. Ct. at 1719), *Swain* was not the most recent case dealing with this issue because, as the Court recognized, the constitutional issues relating to discrimination in the selection of petit juries are indistinguishable from those relating to discrimination in the selection of grand juries, and the Court, in the years since *Swain*, had decided numerous cases relating to the latter, all of which not only supported, but also mandated, the Court's holding in *Batson*. *See* pages 12-13, *infra*.

White, the author of *Swain*, observed in his concurring opinion in *Batson* (106 S. Ct. at 1725 n.*), it would not "have been inconsistent with *Swain* for the trial judge to invalidate [the prosecutor's] peremptory challenges . . . if the prosecutor . . . stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant."

In *Batson*, this Court reaffirmed that *Swain* prohibited racial discrimination in the selection of jurors, but rejected the scheme of proof which some lower courts had subsequently adopted to enforce the constitutional principles stated in *Swain* and its antecedents. *Batson*, 106 S. Ct. at 1720-25. The Court in *Batson* stated (*id.* at 1720-21; footnotes omitted):

> A number of lower courts following the teaching of *Swain* reasoned that proof of repeated striking of blacks over a number of cases was necessary to establish a violation of the Equal Protection Clause. Since this interpretation of *Swain* has placed on defendants a crippling burden of proof, prosecutors' peremptory challenges are now largely immune from constitutional scrutiny. . . . [W]e reject this evidentiary formulation as inconsistent with standards that have developed since *Swain* for assessing a prima facie case under the Equal Protection Clause.

This Court rejected the lower courts' interpretations of *Swain*, not only because those interpretations had effectively eviscerated the rights of criminal defendants to be free from racial discrimination in the exercise of peremptory challenges, but also because those interpretations of *Swain* were wrong. Although the Court conceded that *Swain* itself might have been clearer, the Court suggested that the narrow view of *Swain* adopted by some lower courts had resulted from the failure of those courts to appreciate the fundamental inconsistency between their

interpretations of *Swain* and the general principles of Fourteenth Amendment law which this Court had articulated in other cases. *Batson*, 106 S. Ct. at 1722. The *Batson* Court succinctly explained that fundamental inconsistency (106 S. Ct. at 1722; citations omitted; emphasis in original):

> Thus, since the decision in *Swain*, this Court has recognized that a defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning its selection *in his case*. These decisions are in accordance with the proposition, articulated in *Arlington Heights v. Metropolitan Housing Corp.*, that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions." For evidentiary requirements to dictate that "several must suffer discrimination" before one could object, would be inconsistent with the promise of equal protection to all.

Accordingly, *Batson* formulated no new substantive constitutional standard. Nor did the Court in *Batson* disapprove any practice which it had previously sanctioned. At most, *Batson* disapproved some lower court rulings which misconstrued the Court's decision in *Swain* and were radically inconsistent with numerous holdings of this Court in closely analogous areas of the law.[5]

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[5] In a footnote at the close of its opinion, the Court in *Batson* suggested that "[t]o the extent that anything in *Swain v. Alabama* is contrary to the principles. . . [the Court] articulate[s] today, that decision is overruled" (106 S. Ct. at 1725 n.25; citation omitted). That footnote does not, of course, signal any intention to overrule *Swain*. Indeed, it suggests the contrary, that the Court did

(Footnote continued on following page)

B. The Holding In *Batson* Must Be Applied To Cases Pending On Direct Appeal Because It Followed Well-Established Principles of Proof Developed After *Swain*.

To the extent that *Batson* may be viewed as modifying *Swain* itself, *Batson* should not be viewed as creating new law, but as applying "settled precedents to new and different factual situations,"[6] a posture which requires application of the "new" precedent to cases pending on direct appeal. *Johnson*, 457 U.S. at 548-49.

As we have shown (*see* pages 7-11, *supra*), the *Batson* Court discussed at substantial length the general development of equal protection law in this Court's post-*Swain* cases and demonstrated that the lower courts' interpretations of *Swain* were utterly inconsistent with the general principles articulated in those cases. Of greatest significance, the Court noted that its prior decisions had clearly established the principle that " '[a] single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.' " 106 S. Ct. at 1722 (*quoting Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 n.14 (1977)). In addition, as the

[5] *continued*
not view *Batson* as being inconsistent in any way with *Swain* itself. All that this footnote does is to suggest to the lower courts (some of whose previous interpretations of *Swain* had been expressly disapproved in *Batson*) that they should now look principally to *Batson* as the most complete and most recent statement of the law. If the Court had wished to overrule *Swain*, it certainly would have done so explicitly. In fact, however, as the Court repeatedly recognized in *Batson*, there was no need to overrule *Swain* because the problem rested with the lower courts' interpretations of that decision, not with the decision itself.

[6] In *Batson*, the Court correctly characterized *Swain* itself as a case applying the principles announced in *Strauder* "to particular facts." 106 S. Ct. 1719 & n.13.

Court noted, it is well-established that if a party makes out "a prima facie case of purposeful discrimination by showing that the totality of the relevant facts give rise to an inference of discriminatory purpose" (*id.* at 1721; *citing Washington v. Davis*, 426 U.S. 229, 239-42 (1976)), the burden shifts to the state to explain the exclusion (106 S. Ct. at 1721; *citing Alexander v. Louisiana*, 405 U.S. 625, 632 (1972)).

In particular, the Court noted that these principles had long been held applicable to the closely analogous area of discrimination in the selection of jury venires (106 S. Ct. at 1722; citations omitted):

> In cases involving the venire [which have been decided since *Swain*], this Court has found a prima facie case on proof that members of the defendant's race were substantially underrepresented on the venire from which his jury was drawn, and that the venire was selected under a practice providing "the opportunity for discrimination."

In addition, as the Court further explained in *Batson*, "[t]he basic principles prohibiting exclusion of persons from participation in jury service on account of their race 'are essentially the same for grand juries and for petit juries' " (106 S. Ct. at 1716 n.3; citations omitted). Significantly, the Court, in making this observation, expressly relied on its decision in *Alexander v. Louisiana*, 405 U.S. 625, 626 n.3 (1972), a case which not only condemned discrimination in the selection of grand juries, but also adopted a scheme of proof identical to that adopted in *Batson*. That case was decided more than 14 years ago.

By applying these well-established principles of equal protection law to the area of peremptory challenges, the Court in no sense can be said to have decided *Batson* in a way that constitutes a "clear break" with past prece-

dent. *Batson* merely applied clearly established law to a new area in which its applicability not only was foreseeable, but actually was mandated by the fundamental need for uniformity in the law.

C. The Scheme Of Proof Adopted In *Batson* Is No More Burdensome For The Commonwealth Than That Adopted After *Swain*.

The Commonwealth doubtless will argue that *Batson* overruled *Swain*. As we have shown (*see* pages 7-14, *supra*), this argument misconstrues the body of precedent upon which *Batson* and *Swain* are founded. Nevertheless, the Commonwealth still cannot argue that it will be prejudiced by application of *Batson* to cases pending on direct appeal. The burden caused by such a holding cannot be unduly severe because it will require substantially the same proof that the Commonwealth would have had to adduce in order to rebut a *Swain* showing. Under *Swain*, statistical evidence suggesting a pattern or practice of discrimination did not, of course, create an irrebuttable presumption that discrimination had occurred, either in the cases constituting the statistical sample or in the case on trial (380 U.S. at 224-25). If the prosecution had valid, non-discriminatory reasons for challenging the black veniremen—either in the case on trial or in the cases comprising the statistical sample—those reasons could have been used to rebut the *Swain* showing (380 U.S. at 224-25).

In short, *Swain* itself required prosecutors to exercise their peremptory challenges based upon valid, non-discriminatory reasons. Even if *Swain* did not require that those reasons be put on the record, it certainly required those reasons to be formulated, and, given the scheme of proof mandated by *Swain* and its progeny, prosecutors surely were counselled to retain records as to the use of

their peremptories in case after case, if they wished to prevail against a *Swain*-type challenge.

If prosecutors have chosen not to retain such evidence, they have done so only because of the very ineffectiveness which the *Batson* Court perceived in the scheme of proof developed after *Swain* (106 S. Ct. at 1720-21, 1724). Thus, if prosecutors have failed to preserve such evidence, they have done so only because of the widespread perception that, under *Swain* and its progeny, such information would be more useful to defendants in making a *Swain* showing than to prosecutors in explaining their reasons for striking black jurors.

To the extent that prosecutors may now claim detrimental reliance, that claim rings hollow. The Commonwealth is without standing to argue that its own failure to formulate and record reasons for using its peremptory challenges precludes the application of *Batson* to pending cases. Prejudice cannot be established based on the fact that prosecutors may have failed to preserve the necessary information, when that failure, in turn, was based on some tactical advantage which, under *Swain* and its progeny, prosecutors perceived to exist in the non-retention of that evidence. This Court has never held such "[u]njustified 'reliance' [to be] . . . a bar to retroactivity." *Solem v. Stumes*, 465 U.S. at 646; *see also United States v. Ross*, 456 U.S. 798, 824 n.33 (1982) ("Any interest in maintaining the status quo that might be asserted by persons who may have structured their [illicit] business . . . on the basis of judicial precedents clearly would not be legitimate.").

To cause the Commonwealth now to return to the relatively small number of cases pending on direct appeal, and to explain its reasons for four or five peremptory chal-

lenges, is a minimal burden compared to that contemplated by *Swain* and its progeny—where the Commonwealth might have had to explain its use of peremptory challenges in hundreds of cases spanning many years. In many of the cases now pending on direct appeal, the issue will be easily resolved. In some cases, the point will not have been preserved at all. In others, the parties will have made a thorough public record as to the exercise of peremptories. In still others, the prosecutor will have retained non-public records in anticipation of having to meet a *Swain* showing.[7]

As a result, the administrative burden on the states will be small, particularly when compared to the benefits that will flow from retroactive application of *Batson*, in the

[7] The prosecutor's attempt in the instant case to explain *two* of his four challenges on the record (J.A. 14) suggests that parties were aware of the need for developing a record on this issue long before *Batson* was decided. The reasons are obvious. First, under *Swain*, prosecutors were clearly obligated to formulate non-discriminatory reasons for striking jurors, even if they were not required to put them on the record. Second, the bar had long recognized that certain lower court interpretations of *Swain* were out of step with general principles of Fourteenth Amendment law, a point upon which this Court specifically relied in *Batson* (*see* pages 10-14, *supra*). Indeed, since at least 1978, when the California Supreme Court decided *People v. Wheeler*, 22 Cal. 3d 258, 583 P.2d 748 (1978), the bar has given considerable attention to the making of a proper record on the use of peremptory challenges, in anticipation of an imminent correction by this Court of the unsound principles adopted by some lower courts. In this sense, it is significant that petitioner (like most defendants whose convictions have not yet become final) was tried after this Court denied certiorari in *McCray v. New York*, 461 U.S. 961 (1983), a case in which five members of the Court specifically urged the lower courts to reconsider their interpretations of *Swain*. Most cases tried before that process of reevaluation began have long since passed beyond direct review, and, under *Allen v. Hardy*, will not be subject to a holding in this case mandating retroactive application of *Batson*. *See* page 7, note 3, *supra*.

sense of restoring public confidence in a judicial system in which all men and women stand equal before the law, regardless of race or color, to be dealt with fairly and impartially on the basis of facts, rather than prejudice. *See Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (purpose of the jury is "to guard against the exercise of arbitrary power"); *Peters v. Kiff*, 407 U.S. 493, 503-04 (1972) (excluding blacks from jury service might exclude a range of human nature and experience which "may have unsuspected importance in any case that may be presented").

II.

REGARDLESS OF WHETHER *BATSON* REPRESENTS "A CLEAR BREAK FROM THE PAST," THE FAIRNESS AND INTEGRITY OF THE JUDICIAL PROCESS REQUIRES THAT THE HOLDING IN *BATSON* BE APPLIED TO CASES PENDING ON DIRECT APPEAL.

To the extent that *Batson* might be considered a "clear break" case, this Court still must apply its holding to cases pending on direct appeal, as the Court has done with other "clear break" cases, to preserve public confidence in the integrity and fairness of the judicial process. Four overriding concerns of integrity and fairness mandate that result. First, prosecutors routinely challenge black veniremen for the simple reason that prosecutors perceive that the exclusion of blacks from petit juries makes it easier to convict criminal defendants, particularly those who are black. Such invidious discrimination undermines the reliability of the verdicts pending on direct appeal, and, pursuant to this Court's precedents, requires that *Batson* be applied to cases pending on direct review. Second, fundamental constitutional rules must be applied in a consistent and predictable way to avoid manipulation of constitutional principle and to avoid waste of judicial resources. Third, the constitutional function of this

Court requires that the Court decide the cases that come before it on the merits of each case. Fourth, petitioner and other similarily situated defendants are entitled to be treated in the same way as Batson.

A. Unless *Batson* Applies To Cases Pending On Direct Appeal, Courts Will Be Forced Into Condoning Racial Discrimination Designed To Affect The Outcome Of Trials.

Even in "clear break" cases, this Court has applied newly-decided constitutional rules to cases pending on direct appeal where such application is essential to the integrity of the judicial process and to public confidence in the impartial administration of justice. For example, this Court applied *Mapp v. Ohio*, 367 U.S. 643 (1961), which overruled *Wolf v. Colorado*, 338 U.S 25 (1949), to cases pending on direct appeal when *Mapp* was decided. *See, e.g., Linkletter v. Walker*, 381 U.S. 618, 619, 622 & n.4 (1965); *Stoner v. California*, 376 U.S. 483 (1964); *Fahy v. Connecticut*, 375 U.S. 85 (1963); *Ker v. California*, 374 U.S. 23 (1963); *see also United States v. Johnson*, 457 U.S. at 549 (*citing United States v. Peltier*, 422 U.S. 531, 547 n.5 (1975) (Brennan, J., dissenting) (*collecting* "clear break" cases)).

Although the petitioner in *Linkletter* attacked only the admissibility of evidence, and not the fairness of the trial, the Court still found it appropriate to apply *Mapp* to cases pending on direct appeal, arguably because the *Mapp* rule had been formulated to curb widespread abuse in the admission of illegally obtained evidence, which had occurred under *Wolf*, to the detriment of the integrity of the courts and public confidence in the judicial system. *Linkletter*, 381 U.S. at 629-36; *see also Tehan v. United States*, 382 U.S. 406, 409 n.3 (1966) (*applying Griffin v. California*,

380 U.S. 609 (1965), to cases on direct appeal). Similarly, the *Batson* Court perceived that the rule articulated in *Batson* was necessary, in part, because the interpretations of *Swain* adopted by some lower courts had immunized state prosecutors who chose to discriminate (106 S. Ct. at 1720-21).

The Court has found it most appropriate to give retroactive application to a new rule when it is designed, at least in part, to enhance the reliability of the trial. *Solem*, 465 U.S. at 643; *Ivan V.*, 407 U.S. at 204. Prosecutors discriminate against black veniremen for only one reason, which goes to the very heart of the judicial process: prosecutors believe that eliminating blacks from the jury panel will affect the outcome of the case and make a conviction easier to obtain, a belief which is well-founded on social science studies.[8] In effect, when prosecutors

[8] Social scientists have documented both the tendency of prosecutors to exclude blacks from juries, and the pro-prosecution effect such exclusions may have on a verdict, especially where the government's evidence is insubstantial and the defendant is black. *See, e.g.*, Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev. L. & Soc. Change 1, 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19-22; Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 62 (1974); Davis & Lyles, *Black Jurors*, 30 Guild Prac. 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. U.L.Q. 415, 415-37; Ginger, *What Can Be Done to Minimize Discrimination in Jury Trials?*, 20 J. Pub. L. 427 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 175, 175-80 (1975); H. Kalven and H. Zeisel, *The American Jury* 196-98, 210-13 (1966); McGlynn,

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discriminate in jury selection, they hope to benefit from invidious discrimination in the ultimate decision of the case. In effect, they hope that the truth-seeking function of the jury will be corrupted by racial prejudice. Such a decision-making process is the very antithesis of an impartial trial based on evidence. Indeed, it is the very antithesis of the central principle upon which our system of justice is built—that all men and women, rich and poor, white and black, stand equal before a color-blind, fair, and impartial system of law. Consequently, to protect the integrity of those jury verdicts which are not yet final, this Court must apply *Batson* to cases pending on direct review.[9]

[8] *continued*
Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. Psych. 93 (1976); Rhine, *The Jury: A Reflection of the Prejudices of the Community in Justice on Trial*, 41 (D. Douglas & P. Nobel, eds. 1971); R. Simon, *The Jury and the Defense of Insanity* 111 (1967); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 33-35, 154-60 (1977); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979).

[9] Because *Batson* will enhance the truth-seeking function of the criminal trial process, this case is distinguishable from cases, such as *United States v. Peltier*, 422 U.S. 531 (1975), which hold that the nature of the exclusionary rule mandates that newly decided exclusionary rule cases be given only prospective application. *See also Desist*, 394 U.S. at 250 (the exclusionary rule does not enhance the fairness of the trial). In fact, of course, the exclusionary rule frequently excludes evidence which is indeed probative and would therefore enhance, rather than detract from, the truth-seeking function of the trial. For that reason, retroactive application of any new exclusionary rule should ordinarily be denied. Far from handicapping the truth-seeking function of the trial, rules such as that stated in *Batson* clearly enhance that function by removing considerations which tend to corrupt the trial process and affect the integrity of jury verdicts, and, for that reason alone, such rules must be applied to pending cases.

The interpretations of *Swain* that were adopted by some lower courts after *Swain*, and soundly disapproved by this Court in *Batson*, effectively required that trial courts countenance racial discrimination in the selection of juries. *See Batson*, 106 S. Ct. at 1720-21, 1724. Before *Batson*, prosecutors took advantage of erroneous lower court case law, and engaged in wholesale challenges of black veniremen; they did so because they believed that the exclusion of blacks might affect the outcome of cases. *See* pages 19-20, note 8, *supra*. Because defendants ordinarily were unable to compile the statistical evidence necessary to establish long-term, systematic discrimination, trial judges often believed that they were powerless to intervene and stop discrimination which, they knew full well, was occurring in their courtrooms. These trial judges were therefore required, unwilling though they might have been, to become accessories to a practice which this Court had consistently condemned for more than 100 years. In this sense, this Court's holding in *Batson* is "remedial" because it is directed at discrimination which has been shown to exist, a threat to the integrity of the trial which must be dismantled root and branch. In these circumstances, there can be no justification for failing to apply *Batson* to cases pending on direct review, and to permit those trial judges, whose hands were previously thought to be tied, to do what the Constitution always has required them to do. *See Batson*, 106 S. Ct. at 1724.

In sum, the evidence documenting the wholesale exclusion of black veniremen is overwhelming. *See Batson*, 106 S. Ct. at 1726-27 (Marshall, J., concurring). If the exclusion of blacks from petit juries were not thought by prosecutors to affect the truth-seeking function of the jury, prosecutors would not routinely challenge blacks, and this Court's decision in *Batson* would have been unnecessary. *See Batson*, 106 S. Ct. at 1724. But this Court's decision

in *Batson* was necessary, in part because it "may have some bearing on the truthfinding function of a criminal trial" (*Allen v. Hardy*, slip op. at 4). It is hardly conceivable that prosecutors, having excluded blacks from juries *because* those prosecutors believe that exclusion affects the outcome, may now be heard to contend that the rule in *Batson* should not be applied retroactively because exclusion has no such effect.

B. Cases Such As *Batson* Must Be Applied In A Consistently Predictable Way.

The integrity of the judicial process requires this Court to apply *Batson* in cases pending on direct appeal, but due regard to this Court's constitutional function also requires that result. To guide its consideration of this issue, the Court should look, as it has in the past, to Justice Harlan's definitive analysis of these questions in *Desist* and *Mackey*. Under that analysis, overriding concerns of fairness and equity require that this Court apply *Batson* retroactively.

Justice Harlan warned that judges may be tempted to view retroactivity doctrine as a means for limiting the scope of decisions which they may consider to be controversial or even unsound. *Mackey*, 401 U.S. at 676-77. If retroactivity principles are manipulated in this way, the result is a plethora of incompatible and malleable rules wholly unrelated to principle. *Id.* The Court then becomes a legislature applying its new constitutional rules "as it deems wise." *Id.* at 677. In addition, there is a significant waste of judicial resources because this Court must issue two opinions every time it interprets or modifies constitutional doctrine: One decision explaining the doctrine, the other determining whether it applies retroactively. *See, e.g., United States v. Johnson*, 457 U.S. at 542; *Johnson v. New Jersey*, 384 U.S. 719, 727 (1966).

In this sense, even the "clear break" doctrine is susceptible to manipulation which threatens principled decision-making. Whether a case presents a "clear break" is often a matter of degree subject to argument on both sides. Merely by characterizing a new rule as a clear break, those who question the wisdom of the new rule can undermine its effectiveness, even if, as in *Batson*, the rule is firmly rooted in well-established precedent. The precision, predictability, and efficiency inherent in the principle that new rules ordinarily should apply to cases pending on direct appeal would therefore be subverted by any principle that would require extensive debate about what constitutes a clear break. The application of the "clear break" principle must therefore be limited to cases where this Court has, unlike *Batson*, explicitly overruled past precedents which have sanctioned state conduct now deemed to be unconstitutional. Unless the clear break doctrine is so construed, the inevitable result will be the very uncertainty and inconsistency predicted by Justice Harlan.[10]

[10] Indeed, as we have previously noted (*see* page 16, note 7, *supra*), only some lower courts had adopted the interpretation of *Swain* disapproved in *Batson*. Other courts, recognizing that that interpretation was inconsistent with a vast body of Fourteenth Amendment precedent, had emphatically rejected it. Moreover, in *McCray v. New York*, 461 U.S. 961 (1983), five Justices specifically urged the lower courts to reconsider their interpretations of *Swain*. Thus, it should be obvious that *Batson* is not a "clear break" case. However, to the extent that argument can even be made on the point, that fact demonstrates the problems inherent in not restricting the "clear break" doctrine to its narrowest possible application, that is, to cases which (unlike *Batson*) have explicitly and undeniably overruled past precedents of this Court.

C. Applying *Batson* Prospectively Will Penalize Griffith And Other Defendants Whose Cases Are Pending On Direct Appeal For The Merely Fortuitous Reason That *Batson* Was The First Case The Court Decided To Review.

By necessity, this Court may announce new constitutional rules only by deciding cases over which the Court has jurisdiction. *E.g.*, *Marbury v. Madison*, 1 U.S. 267, 1 Cranch 137 (1803); *see Mackey*, 401 U.S. at 677-79 (Harlan, J., concurring in part); *Desist*, 394 U.S. at 258-59 (Harlan, J., dissenting). To facilitate this system of judicial review, the Court clearly has been afforded broad discretion over its docket. 28 U.S.C. §§ 1254, 1257, and 1258 (1982); *see Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 918-19 (1950) (statement of Frankfurter, J., regarding denial of petition for writ of certiorari).

Differences in result, however, cannot be justified in any rational way if they are based on idiosyncracies arising from the certiorari process which are wholly irrelevant to the merits of a defendant's case. Suppose, for example, that petitioner had actually filed his petition for a writ of certiorari before the petition was filed in *Batson*, but that the Commonwealth had challenged petitioner's right to proceed *in forma pauperis*, and the Court had, quite properly, delayed action on the petition at bar pending the receipt of further information concerning petitioner's financial status. In the meantime, the Court doubtless would have granted Batson's petition and then decided to hold petitioner's case pending resolution of the issue in *Batson*. Or suppose that petitioner had been tried first, but that the Kentucky Supreme Court had kept petitioner's case under advisement for a longer period of time, because of other difficult questions presented for review in the case, so that Batson's case had reached this Court first. To make the granting of relief depend upon such

fortuities, in an area so central to the administration of justice, simply defies reason.

In addition, many of the cases that did not reach the Court before *Batson* was decided may well (and probably do) involve factual circumstances far more susceptible to manipulation of racial prejudice than was the case in *Batson* itself. Similarly, many of those cases may well (and probably do) involve more serious penalties, such as capital punishment, where the Eighth Amendment's heightened demand for impartial fact-finding, untainted by racial prejudice or unfairness of any kind, is manifest. *Turner v. Murray*, 106 S. Ct. 1683, 1687-88 (1986); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). In view of these factors, one cannot reasonably assert that the vindication of a criminal defendant's right to have a jury selected without racial discrimination should depend upon his winning the race to the doors of this Court.

The idiosyncracies of the appellate process cannot be permitted to interfere with this Court's fulfillment of its constitutional duty. Justice Harlan put it most eloquently when he observed that "[s]imply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases to flow by unaffected by that new rule constitute an indefensible departure from" the most fundamental principles of judicial review. *Mackey*, 401 U.S. at 679.

D. Defendants In The Same Situation As Batson Must Be Treated In The Same Way.

This Court, like any other, must grant similarly situated defendants "the same relief or give a principled reason for acting differently." *Desist*, 394 U.S. at 258 (Harlan,

J., dissenting). The tradition of the common law, and adherence to the rule of law, demands no less. *Id.* Regardless of whether *Batson* was a clear break from *Swain*, defendants whose cases were pending on direct review when *Batson* was decided must be afforded the same remedy that Batson received. *Batson* and its antecedents recognize a personal constitutional right in each defendant to be free from racial discrimination in the prosecution of his individual case. To grant redress for the violation of that right in Batson's case, while denying it to all others similarly situated, is therefore inconsistent with *Batson* itself.

The fortuities of the judicial process cannot be allowed to determine which defendants obtain relief from the same fundamental wrong. The central meaning of the Equal Protection Clause is "that those who are similarly situated be similarly treated." Tussman and tenBroek, *The Equal Protection of the Laws*, 37 Calif. L. Rev. 341, 344 (1949). If the Court provides a remedy for a fundamental violation of equal protection, such as that recognized in *Batson*, this Court must administer that rule in a spirit consistent with its basic purpose. The chronological details of petitioner's appeal have nothing to do with whether he suffered the discrimination condemned in *Strauder*, *Swain*, and *Batson*, and those details should have nothing to do with whether he is entitled to relief. *See United States v. Johnson*, 457 U.S. at 555 n.16.

As Justice Harlan said, "a proper perception of [this Court's] . . . duties as a court of law, charged with applying the Constitution to resolve every legal dispute within [the Court's] . . . jurisdiction on direct review, mandates that . . . [the Court] apply the law as it is at the time, not as it once was." *Mackey*, 401 U.S. at 681 (Harlan, J., concurring in part).

CONCLUSION

The judgment of the Supreme Court of Kentucky should be vacated and the case remanded for consideration in light of *Batson v. Kentucky*.

Respectfully submitted,

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Dated: August 1, 1986

No. 85-5221

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

RANDALL LAMONT GRIFFITH,
Petitioner,

-vs-

COMMONWEALTH OF KENTUCKY,
Respondent.

On Petition For Writ Of Certiorari

To The Supreme Court of Kentucky

Brief of The National Legal Aid And Defender Association As Amicus Curiae

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INTEREST OF AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a private, non-profit, national membership organization headquartered in Washington, D.C. whose purpose is to ensure the availability of quality legal services in civil and criminal cases to all persons unable to retain counsel. Specifically,

NLADA represents approximately 1,753 programs engaged in providing representation to indigents in civil cases and 586 defender offices engaged in providing representation to indigents accused of criminal offenses. The membership of NLADA, therefore, comprises most public defender offices and legal service agencies around the nation, as well as assigned counsel plans and private practitioners.

The NLADA is vitally interested in ensuring that the indigent criminal defendants its members represent are guaranteed their right to be tried by constitutionally comprised juries. In this case the Court will be deciding whether the rule of Batson v. Kentucky will be applied to all defendants whose convictions were not yet final at the time the rule was announced. Extension of the benefits of Batson to those on direct appeal would contribute to the goal of NLADA of promoting equal justice under the law.

SUMMARY OF ARGUMENT

Since the rule of Batson v. Kentucky furthers the goal of enhancing the accuracy of the truth-finding function of the jury, has more than a prophylactic function, and is not such a clear break with the past that prospective effect only is mandated, principled decisionmaking and fairness to similarly situated defendants requires that the rule of Batson be extended to all defendants whose convictions were not final at the time it was announced.

ARGUMENT

RETROSPECTIVE APPLICATION OF BATSON v. KENTUCKY TO ALL NONFINAL CONVICTIONS IS CONSISTENT WITH THIS COURT'S DECISIONS IN UNITED STATES v. JOHNSON AND SHEA v. LOUISIANA THAT EXTENDING THE BENEFITS OF A NEW RULE TO ALL CASES PENDING ON DIRECT APPEAL AT THE TIME THE RULE IS ANNOUNCED IS MANDATED BY CONSI-

DERATIONS OF PRINCIPLED DECISIONMAKING AND FAIRNESS TO SIMILARLY SITUATED DEFENDANTS.

In Batson v. Kentucky, 106 S.Ct. 1712 (1986), this Court took an historic step toward eliminating racial discrimination in jury selection, a practice this Court has consistently condemned, by recognizing that a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Batson, 106 S.Ct. 1712, 1722. To the extent that lower courts had interpreted Swain v. Alabama, 380 U.S. 202 (1965) to require proof of repeated striking of blacks over a number of cases to establish a violation of the Equal Protection Clause, Batson rejected this evidentiary formulation as inconsistent with standards that had developed since Swain for assessing a prima facie case under the Equal

Protection clause. Batson, 106 S.Ct. 1712, 1721.

Although this Court then determined in Allen v. Hardy, ___U.S.___(No. 85-6593, June 30, 1986), that Batson effected a change in the burden of proving unconstitutional abuse of the peremptory challenge which should not be applied retroactively to convictions that were final at the time Batson was decided, the same result cannot be justified in the direct appeal context. While retroactive application of new rules of constitutional law generally does little to advance the purposes of collateral relief on habeas, so that it is particularly difficult in such cases to justify imposing upon the State the costs of collateral review, Solem v. Stumes, 465 U.S. 638, 654 (Powell, J., concurring), different considerations compel the conclusion that all defendants whose convictions were not final at the time Batson was announced should have the benefit of that decision. Retrospective application of new

rules to federal habeas corpus petitioners is unnecessary because review designed to determine that the conviction rests upon correct application of the law at the time of the conviction is all that is required to force trial and appellate courts to toe the constitutional mark. Mackey v. United States, 401 U.S. 667, 687 (Harlan, J., concurring and dissenting). However, it is an indefensible departure from the model of judicial review to "simply [fish] one case from the stream of appellate review, [use] it as a vehicle for pronouncing new constitutional standards, and then [permit] a stream of similar cases subsequently to flow by unaffected by that new rule." Mackey, 401 U.S. 667, 679.

In United States v. Johnson, 457 U.S. 537, 549 (1982) and Shea v. Louisiana, 105 S.Ct. 1065 (1985), retroactive effect was given to new rules announced in the Fourth and Fifth Amendment areas to all cases pending on direct review where the new rule

did not so change the law that prospectivity was the proper course. The identical considerations that persuaded this Court in Johnson and Shea that a fair resolution of the retroactivity question was to apply the new rule to all cases not final at time the new rule was announced persuade that the same conclusion be reached here. Retroactive application of Batson to all nonfinal convictions would provide a principle of decisionmaking consonant with the original understanding of retroactivity found in Linkletter v. Walker, 381 U.S. 618 (1965) and Tehan v. Shott, 382 U.S. 406 (1966), would comport with this Court's judicial responsibility to do justice to each litigant on the merits of his own case, and would further the goal of treating similarly situated defendants similarly. Johnson, 457 U.S. 537, 554, 555. It would allow this Court to avoid being in the position of a super-legislature, selecting one of several cases before it to announce the new rule and then letting all

other similarly situated persons be passed by unaffected and unprotected by the new rule. Shea, 105 S.Ct. 1065, 1069. Failure to apply Batson to all cases pending on direct review at the time of the decision would violate these norms of constitutional adjudication. Johnson, 457 U.S. 537, 546.

Although Johnson addressed solely the retroactivity of a new Fourth Amendment rule to direct appeal cases, this Court in Shea noted that there is nothing about a Fourth Amendment rule which suggests that it should be given greater retroactive effect than a Fifth Amendment rule, which may be more likely to affect the truth-finding process than a Fourth Amendment violation. Shea, 105 S.Ct. 1065, 1070. The equal protection deprivation that Batson is designed to protect against also has a bearing on the truthfinding function of a criminal trial. Allen v. Hardy, ___U.S.___ (Slip Opinion, p. 4). Just as exclusion of minority viewpoint by decreasing the size of the jury or

elimination of the unanimity requirement unconscionably increases the risk of inaccurate fact-finding, Brown v. Louisiana, 447 U.S. 323, 333, 334 (1980), by removing from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable, depriving the jury of a prospective on human events that may have unsuspected importance on any case that maybe presented, Peters v. Kiff, 407 U.S. 493, 502-504 (1972), exclusion of minority viewpoint by discriminatory use of the peremptory challenge creates a great potential for harm. The counterbalancing of various biases which is critical to the accurate application of the common sense of the community to the facts of any given case, Ballew v. Georgia, 435 U.S. 223, 234 (1978), is sacrificed. The reasoning of Johnson and Shea should therefore be extended to Equal Protection Clause violations.

THE RULE OF BATSON v. KENTUCKY IS NOT SUCH A "CLEAR BREAK WITH THE

PAST" THAT PROSPECTIVE EFFECT ONLY IS MANDATED.

Batson v. Kentucky merely reaffirmed the principle of Swain v. Alabama, 380 U.S. 202 (1965), that the Equal Protection Clause is offended where the State purposefully excludes blacks from jury participation, and reexamined the standards for assessing whether a defendant had met his burden of establishing a prima facie showing of purposeful discrmination in the prosecution's use of its peremptory challenges. Subsequent to Swain this Court had recognized that a defendant may discharge his burden of demonstrating purposeful discrimination in jury selection by relying solely on the facts concerning selection of the jury in his case. In Batson the Court concluded that a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. Because

Batson merely repeated Swain's warning to prosecutors "that using peremptories to exclude blacks on the assumption that no black juror could fairly judge a black defendant would violate the Equal Protection Clause," Batson, 106 S.Ct. 1712, 1725 (White, J., concurring), and tailored the burden to be sustained by the defendant who claims an equal protection violation to the prevailing standards, it cannot be construed as a "sharp break in the web of the law," Milton v. Wainwright, 407 U.S. 371, 381 n. 2 (1972), as to be given no retroactive effect.

Batson did not create an entirely new rule which in effect replaced an older one, Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 498 (1968), but approved and modified an existing rule. To the extent that the rule was modified, the modifications were distinctly foreshadowed by intervening decisions, which recognized that a consistent pattern of official racial discrimination is not a necessary predicate to a violation of

the Equal Protection Clause, Batson, 106 S.Ct. 1712, 1722, which fact weighs in favor of retroactive application. Berger v. California, 393 U.S. 314, 315 (1969). Batson did not invalidate a practice of unquestioned legitimacy, Brown v. Louisiana, 447 U.S. 323, 335 (1980), or disapprove a practice sanctioned in prior cases. United States v. Johnson, 457 U.S. 537, 551 (1982). The principle that the State denies a black defendant equal protection of the laws when it puts him on trial before a jury from which members of his race have been excluded has been consistently and repeatedly affirmed in numerous decisions dating from Strauder v. West Virginia, 100 U.S. 303 (1980). Batson, 106 S.Ct. 1712, 1719. Batson therefore does not fall into that narrow class of decisions whose non-retroactivity is effectively preordained because they unmistakably signal a clear break with the past.

BATSON v. KENTUCKY IS NOT A MERE PROPHYLACTIC RULE DESIGNED TO PROTECT EXISTING RIGHTS BUT ENHANCES THE TRUTH-FINDING FUNCTION OF A CRIMINAL TRIAL AND THEREFORE ITS MINIMAL DISRUPTIVE EFFECT ON THE ADMINISTRATION OF JUSTICE MUST BE TOLERATED.

That only those defendants who can demonstrate that the prosecutor's illegal use of his peremptory challenges denied them equal protection of the law will obtain relief from their convictions pursuant to Batson weighs in favor of retrospective application. Generally, if retroactive application of a new rule would occasion reversal in many instances in which no actual prejudice has been suffered, prospective application is favored. Michigan v. Payne, 412 U.S. 47, 54 (1973). In Michigan v. Payne, North Carolina v. Pearce, 395 U.S. 711 (1969) was held to be nonretroactive because retroactive application would require

repudiation of sentences imposed in circumstances where there was no geninue possibility of vindictiveness. Moreover, those defendants who had in fact suffered retaliatory sentencing were not without a remedy but could assert their claim that they had been denied due process. Accord Solem v. Stumes, 465 U.S. 638, 644 (1984) and Stovall v. Denno, 388 U.S. 293, 299 (1967).

The rule of Batson, however, is not a prophylactic one which would occasion windfall benefits for defendants who have suffered no constitutional deprivation. Michigan v. Payne, 412 U.S. at 53. Only those defendants who are able to demonstrate that the prosecutor's use of his challenges was racially motivated, i.e., who have in fact suffered the constitutional deprivation Batson is designed to eliminate, will benefit. The injury they will have suffered is substantial inasmuch as the rule in Batson has bearing on the truthfinding function of a criminal trial. Allen v. Hardy, ___U.S.___

(Slip Opinion, p. 4). If Batson is given no retroactive effect, defendants who have been denied equal protection have no remedy.

Retrospective application of Batson to nonfinal convictions will have little disruptive effect on the administration of justice. Unlike collateral review cases, the time lapse between the jury selection and the hearing envisioned by Batson in direct review cases will not be so great as to render it impossible for a prosecutor to recall his reasons for his challenges,[1] especially since prosecutors have been put on notice by the denial of certiorari in McCray v. New York, 461 U.S. 961 (1983) and the grant of certiorari in Batson that some adjustment in the burden of proving a prima facie case of discrimination might be forthcoming and it

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[1] As this Court noted in Shea, 105 S.Ct. 1065, 1071, any excessive delay in a direct appeal is as much the fault of the State as it is of the defendant.

has not been uncommon in recent years for prosecutors to volunteer their reasons for exercise of challenges, either in response to a trial objection or an argument made in a reviewing court, in anticipation of a change in the law. The observation made in Brown v. Louisiana, 447 U.S. 323, 337 (1980) is also apt: what little disruption to the administration of justice results from retroactive application must be considered part of the price we pay for former failures to provide fair procedures. Batson recognized that the prior evidentiary requirement that dictated that several must suffer discrimination before one could object, was inconsistent with the promise of equal protection to all. Batson, 106 S.Ct. 1712, 1722. Denial of retrospective application of Batson to direct appellants would merely perpetuate this injustice and further delay restoration of the confidence of the public and the accused in the fairness of the jury system.

CONCLUSION

In order to do justice to those defendants who have been denied equal protection of the law by the prosecution's discriminatory use of the peremptory challenge, Batson v. Kentucky, must be retrospectively applied to all cases pending on direct appeal at the time the decision was announced.

Respectfully submitted,

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Nos. 85-5221 and 85-5731

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

RANDALL LAMONT GRIFFITH,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

WILLIE DAVIS BROWN,

Petitioner,

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY IN NO. 85-5221 AND TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN NO. 85-5731

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

What should be the extent of the retroactive application given the decision in Batson v. Kentucky, 476 U.S. ___, 90 L.Ed.2d 69 (1986)?

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY IN No. 85-5221 AND TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT IN No. 85-5731

BRIEF OF THE NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC., AND THE AMERICAN JEWISH CONGRESS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF AMICI*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit corporation

* Letters from the parties consenting to the filing of this brief have been lodged with the Clerk of the Court.

organized under the laws of the State of New York in 1939. It was formed to assist blacks to secure their constitutional rights through the prosecution of lawsuits. Under its charter, the Fund renders legal aid to impoverished blacks suffering injustice by reason of race. For many years, its attorneys have represented parties and participated as amicus curiae before this Court and in the lower state and federal courts.

The Fund has a long-standing concern with the exclusion of blacks from jury service and the impact of that practice on the criminal justice system. It has raised jury discrimination claims in appeals from criminal convictions, see, e.g., Swain v. Alabama, 380 U.S. 202 (1965); Alexander v. Louisiana, 405 U.S. 625 (1972), and currently represents clients who have been affected by this practice. See, e.g., Gordon v. United States, No. 85-7726 (11th

Cir.)(pending); Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986).

The American Jewish Congress is a national organization of American Jews founded in 1918. It is concerned with the preservation of the security and constitutional rights of all Americans. Since its creation, it has vigorously opposed racial and religious discrimination in all areas of American life, including the administration of justice.

SUMMARY OF ARGUMENT

At the least, decision in the two cases before the Court should follow from the Court's recent retroactivity decisions, see, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38 (1985); United States v. Johnson, 457 U.S. 537 (1982), which apply new constitutional decisions to all similarly situated cases still pending on direct appeal. This approach is strongly recommended by three considerations: (1) it promotes predictability in constitutional adjudication; (2) it strikes a reasonable balance between the concerns of equity and stability; and (3) it is rooted in judicial practice with a pedigree nearly as old as the Republic itself. See United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801).

Amici write separately, however, to put before the Court their views concerning the broader reach of the decision last Term in

Batson v. Kentucky, 476 U.S. ___, 90 L. Ed.2d 69 (1986). The inclusion of blacks and other minorities on criminal juries is important not merely for the social values of participation, legitimacy, and nondiscrimination. A proper understanding of what juries do and how they do it leads inevitably to the conclusion that the exclusion of blacks has a direct and demonstrable impact on the actual outcomes of jury verdicts -- that is, on the truth-finding process. Thus, full retrospective application is called for.

The rule announced in Batson is not, in its own terms, a "clear break" with past law. The exclusion of potential jurors solely on the basis of their race is and was a grave constitutional wrong in which no conscientious prosecutor should have indulged -- Swain v. Alabama, 380 U.S. 202 (1965), notwithstanding. Accordingly, the good faith reliance by prosecutors on past

precedent does not weigh in favor of limited application of the decision in Batson.

Because of the nature of the sentencing decision in capital cases, involving as it does the application of value judgments to a highly discretionary decision, the exclusion of blacks and other minorities has a heightened impact on the decision-making process in those cases. Accordingly, Batson should be fully retroactive to all challenges to death sentences imposed or recommended by juries from which blacks were improperly excluded.

ARGUMENT

I. BECAUSE THE EXCLUSION OF BLACKS AND OTHER MINORITIES HAS A DIRECT IMPACT ON A JURY'S DECISION-MAKING THAT RAISES SERIOUS QUESTIONS ABOUT THE ACCURACY OF THE RESULTING VERDICT, AND BECAUSE PROSECUTORS' INVOCATION OF THE PRACTICE WAS NOT IN GOOD FAITH, THE RULE OF BATSON v. KENTUCKY SHOULD BE RETROACTIVE

"[R]esolution of the question of retroactivity [i]s not automatic[]...." Brown v. Louisiana, 447 U.S. 323, 327 (1980)(plurality opinion). "Each constitutional rule of criminal procedure has its own distinct functions, its own background of precedent, and its own impact on the administration of justice...." Linkletter v. Walker, 381 U.S. 618, 728 (1965). Nevertheless, amici respectfully submit that the Court should at least follow its recent practice of holding new constitutional decisions retroactive to cases not yet final. See, e.g., Shea v. Louisiana, 470 U.S. ___, 84 L.Ed.2d 38

(1985); United States v. Johnson, 457 U.S. 537 (1982); Brown v. Louisiana, supra.

Adherence to this practice serves several important values. First, it provides predictability in constitutional adjudication, avoiding the appearance of inconsistency and unfairness that results from the changing contours of retroactivity doctrine. See United States v. Johnson, 457 U.S. at 547; Mackey v. United States, 401 U.S. 667, 677 (1971) (Harlan, J., dissenting). Second, it strikes a reasonable balance between the concerns of stability in the law, on one hand, and equity, on the other. See United States v. Johnson, 457 U.S. at 555-56.

Third, it promotes the legitimacy of the constitutional decision-making process;[1] full prospectivity creates the

[1] A contrary approach would undermine constitutional adjudication in another way not explored in the text. Without some incentive for litigants to raise an issue that previously had been rejected by the

appearance of the judiciary "fishing one case out of the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule...." Mackey, 401 U.S. at 678-79 (Harlan, J., dissenting). Finally, it is consonant with "basic judicial

courts, outmoded, incorrect, or inefficient rules never would be challenged. Without some incentive, it would always be too "costly," -- the issue would be displaced in the litigant's brief by other issues more likely to succeed or, at least, more likely to command the attention of an appellate court. See Jones v. Barnes, 463 U.S. 745 (1983).

Obviously, the incentive that motivates litigants to challenge such rules is the possibility of victory on appeal. A pure prospectivity rule diminishes severely that incentive by limiting to a universe of one the number of litigants who possibly may benefit from a rule change. The predictable result is a dearth of necessary challenges to outmoded doctrines and the potential ossification of the law. See Priest & Klein, The Selection of Disputes for Litigation, 13 J. Legal Stud. 1 (1984); Priest, The Common Law Process and the Selection of Efficient Rules, 6 J. Legal Stud. 65 (1977).

tradition...." Desist v. United States, 394 U.S. 244, 258 (1969) (Harlan, J., dissenting); see United States v. The Schooner Peggy, 5 U.S. (1 Cranch) 103, 110 (1801).

It is our position, however, that the decision in Batson should be accorded full retroactive effect under the standards developed in Linkletter and its progeny.[2] In the sections that follow, we discuss the tripartite standard governing retroactivity articulated in Stovall v. Denno, 388 U.S. 293, 297 (1967),[3] as interpreted in subsequent cases.

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[2] Because the Court now has the benefit of full briefing and argument on this issue, it would be appropriate to reconsider its contrary decision in Allen v. Hardy, ___ U.S. ___, No. 85-6593 (June 30, 1986).

[3] The Stovall Court expressed the considerations as follows: "(a) the purpose to be served by the new standard; (b) the extent of reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards." Id. at 297.

A. The Exclusion of Blacks from Criminal Juries Affects in Fundamental Ways the Accuracy and Reliability of the Decision-making Process

The use of peremptory challenges to remove potential jurors on the basis of their race violates core constitutional values concerning equal protection and public participation in the criminal justice system; it undermines as well public confidence in the legitimacy and fairness of that system. But it does not follow that these are the primary values implicated by this unconstitutional practice.

Common sense suggests that the rule of Batson is neither a mere prophylactic--like those at issue in Johnson v. New Jersey, 384 U.S. 719 (1966), and Shea v. Louisiana -- nor a product solely of policy concerns extrinsic to the accuracy and reliability of the trial process--like those at issue in Linkletter and

United States v. Johnson. Rather, like the rule against coerced confessions, it serves "a complex of values," Blackburn v. Alabama, 361 U.S. 199, 207 (1960), some of which bear heavily on the truth-finding process and, therefore, mandate retroactive effect. Linkletter, 381 U.S. at 638; see, e.g., Arsenault v. Massachusetts, 393 U.S. 5 (1968).

This is clear when one considers the nature of the practice that Batson condemned. Prosecutors who used their peremptory challenges to strike black potential jurors did so not primarily out of blind racial animus; they did so because they believed that it affected the outcomes of their cases. Thus, one prosecutor testified about his former practice and the reasons for his change:

> So we made a determination that we were not going to in any way discriminate against blacks; we were going to try to keep black jurors..., and the longer we tried that, the more discouraged we got about it.... We just had to abandon

> that philosophy. * * * And the defense attorneys can tell you very well when that happened, because it's when they started losing more cases.

Edwards v. Thigpen, Civil Action No. J 83-0566(B)(S.D. Miss.), Deposition of Edward J. Peters at 31, 34 (April 12, 1985).

All jurors are not fungible; the deliberate exclusion of minorities from criminal juries has a direct and demonstrable effect on the actual outcomes of criminal cases. The reasons are readily apparent when one considers both what a jury does and how it does it.

It is simplistic to view the jury solely as the finder of "facts" subject to measurement by some objective standard of "truth" or "falsity." Hardly any criminal case is so one-dimensional. Nor is the jury's judgment limited to the binary alternatives of "guilt" or "innocence." "[T]he jury plays a political function in the administration of the law...." Taylor v. Louisiana, 419 U.S. 522, 529 (1975). "It

must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it." Id. at 26 n. 37 (quoting H.R. Rep. No. 1076, 90th Cong., 2d Sess., reprinted in 1968 U.S. CODE CONG. AND AD. NEWS 1792, 1797, the House Report on the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861 et seq.).[4]

The jury functions in part by invoking its values to express the community's judgment of the severity of the offense and the moral culpability of the offender. Cf. Vasquez v. Hillery, 474 U.S. ___, 88 L.Ed.2d 598, 608-09 (1986)(grand jury). It

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[4] As Justice Rehnquist has observed: "Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passionate elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community." Parklane Hosiery Co. v. Shore, 439 U.S. 322, 341-42 (1979)(Rehnquist, J., dissenting) (quoting O. Holmes, COLLECTED LEGAL PAPERS 237 (1920)).

may do so in obvious ways, as when it chooses between guilt of the crime charged or of a lesser included offense. See Keeble v. United States, 412 U.S. 205 (1973). Or it may do so in less obvious ways when it treats the variety of factual and mixed factual-legal decisions with which it is regularly confronted.

This becomes clear when one considers the multi-dimensional nature of even a simple criminal case. For example,

> [i]magine a manslaughter charge arising out of reckless driving. The decision-maker must determine the truth of a certain number of propositions regarding "external facts," such as the speed of the automobile, the condition of the road, the traffic signals, the driver's identity, and so on. ... The inquiry here appears to be relatively objective, and the truth about such facts does not seem to be too elusive.
>
> But many "internal facts" will also have to be established.... They regard aspects of the defendant's knowledge and volition.... The ascertainment of such facts is already a far less objective undertaking than the ascertainment of facts derived by the senses....

> The situation changes, however, when the facts ascertained must be assessed in the light of the legal standard. Whether a driver has deviated from certain standards of care -- and if so to what degree -- are problems calling for a different type of mental operation than that used in dealing with external facts.

Damaska, Presentation of Evidence and Fact-finding Precision, 123 U.Pa.L.Rev. 1083, 1085-86 (1975). The impact on the decision-making process of the exclusion of minorities must be understood at each level of the truth-finding process.

The exclusion of minority jurors will inevitably result in the exclusion of perspectives and values not otherwise represented. This will have obvious impact on the qualitative decisions regarding intent and the application of legal standards to the facts of the case. But even at the first, most objective level -- that of "external facts" -- the exclusion of minorities will have a skewing effect on

the accuracy of factfinding in several distinct ways.[5]

A jury is often called upon to ascertain facts on the basis of the credibility of the witnesses. In a case involving a black defendant -- or, as in Griffith, a black defendant and white victims -- the array of witnesses will often divide on racial lines. In assessing their credibility on the basis of their demeanor, for example, it matters a great deal if there are blacks on the jury who are accustomed to the habits of speech and mode of presentation exhibited by the

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[5] One study found that, when showed a picture of a white person armed with a razor apparently arguing with a black man, over half of the subjects reported that it was the black man who held the razor. G. Allport & L. Postman, THE PSYCHOLOGY OF RUMOR 111 (1965), discussed in Johnson, Black Innocence and the White Jury, 83 Mich. L. Rev. 1611, 1645 (1985).

defendant that might be unfamiliar or even threatening to white jurors.[6]

The perception of primary, "external facts" is also affected by the values brought to the jury room. The Court recognized as much in Adams v. Texas, 448 U.S. 38 (1980) -- where the value at issue was the jurors' scruples against the death penalty. There, the Court acknowledged that the jurors' values "may affect what their honest judgment of the facts will be or what they may deem to be a reasonable

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[6] See Peters v. Kiff, 407 U.S. 493 (1972)(plurality opinion):

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude ... that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Id. at 503-04.

doubt. Such assessments and judgments by jurors are inherent in the jury system. ..." Id. at 50.

This conclusion, of course, has strong empirical foundations in the work of Professors Kalven and Zeisel, H. Kalven, Jr., & H. Zeisel, THE AMERICAN JURY (1966). In their study of judge-jury disagreements, they found that

> to a considerable extent, or in exactly 45 per cent of the cases, the jury in disagreeing with the judge is neither simply deciding a question of fact nor simply yielding to a sentiment or values; it is doing both. It is giving expression to values and sentiments under the guise of answering questions of facts.

Kalven & Zeisel, supra, at 116.[7]

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[7] Thus, what may look apparent to a reviewing court may have seemed very different to the jurors who heard all the testimony and wrestled with the facts in light of community values. "[T]he more one is removed from the fullness of life, the more limited but also the more precise is our knowledge: there is one fixed perspective. On the other hand, the closer one remains to the complexity of real life processes, the more encompassing but also the less certain is one's understanding: as in cubism, our sensations come from

Moreover, the very nature of the reasonable doubt standard means not only that the jury will necessarily call upon its values, but also that an individual juror will make a difference. Kalven and Zeisel found that juries by and large have a higher threshhold of reasonable doubt than do judges, but they did not ascribe that difference to any "distinctive value[s] held by laymen." Kalven & Zeisel, supra, at 189 n. 5. Rather, they concluded that if a jury "decides close cases with a higher cut-off point than does a single judge, the explanation may reside in the unanimity requirement. The jury, to avoid disagreement, would tend in the direction of its most stringent member." Id. Thus, the exclusion of a single minority juror who holds a more stringent view of "what [he] may deem to be a reasonable doubt...,"

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multiple viewpoints and there is more than one side to every story." Damaska, supra, at 1104.

Adams v. Texas, 448 U.S. at 50, will have a profound impact on the jury's decision-making process. This affects the truth-finding process in a manner so vital as to command retroactive application. See Hankerson v. North Carolina, 432 U.S. 233 (1977); Ivan V. v. City of New York, 407 U.S. 203 (1972).

The improper exclusion of even a single minority juror will have an actual impact on the outcome of the jury verdict in other empirically demonstrable ways. For example, Kalven and Zeisel found that the incidence of hung juries depends on the number of dissenting jurors: "for one or two jurors to hold out to the end, it would appear necessary that they had companionship at the beginning of the deliberations. ... To maintain his original position, not only before others but even before himself, it is necessary for him to have at least one ally." Kalven & Zeisel, supra, at 463.

Thus, the use of peremptory challenges to exclude a single minority juror could literally spell the difference between conviction, on one hand, or a hung jury resulting ultimately in acquittal, on the other. See Brown v. Louisiana, 447 U.S. at 332 & n. 10.

The Court need not speculate on this matter, for the records in each of the cases before it provide eloquent demonstrations of the impact of this practice on actual juries. In Brown, the Assistant United States Attorney testified that the reason he used his peremptories to strike blacks was that a previous case in which he did not do so ended in a hung jury. Appendix D to the Petition for Certiorari in No. 85-5731, at 20.

Griffith provides an even more compelling example. There, the key issue was a questionable cross-racial

identification.[8] Mr. Griffith was tried twice. He was convicted by a jury from which blacks were purged by the prosecutor's use of peremptory challenges. But the first trial, at which the prosecutor struck only three of the four blacks on the venire, ended in a hung jury.

The exclusion of a single minority juror can have an actual impact on the ultimate verdict in another way. Kalven and Zeisel found "that with very few exceptions the first ballot decides the outcome of the verdict." Kalven & Zeisel, supra, at 488 (emphasis in original). The effect of the initial vote was quite precise, and revealing: an initial vote of 7-5 to convict resulted in a verdict of "guilty" 86% of the time; an initial vote of 7-5 to acquit resulted in a verdict of "innocent"

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[8] Mr. Griffith testified and denied guilt. One of the white victims, who positively identified him as the assailant, also testified that she saw him on the street two weeks after the crime -- at a time when Mr. Griffith was in jail awaiting trial.

91% of the time; and an initial vote of 6-6 made the ultimate result a toss-up: "the final verdict falls half the time (it so happens, exactly half the time) in one direction and half in the other." Id. The impermissible purging of a single minority juror can shift the balance on the initial vote in a way that in fact determines the outcome.

"Thus, it makes a good deal of difference in this decision-making who the personnel are." Kalven & Zeisel, supra, at 496; see also Ballard v. United States, 329 U.S. 187, 194-95 (1946). Indeed, the identity of the jurors is more important to the outcome than the deliberation process. Kalven & Zeisel, supra, at 496. Thus, the fact that the remaining jurors may themselves be fair and impartial "does nothing to allay our concern about the reliability and accuracy of the jury's verdict." Brown v. Louisiana, 447 U.S. at

333. "Any practice that threatens the jury's ability to perform that function poses a similar threat to the truth-determining process itself. The rule in [Batson] was directed toward elimination of just such a practice. Its purpose, therefore, clearly requires retroactive application." Id. at 334.[9]

B. The Reliance by Prosecutors on Swain Does Not Support Prospective Application of the Standards Enunciated in Batson

Batson was not the kind of "clear break" with past precedent that would warrant prospective application. First, Batson did not purport to change the substantive standard governing the use of peremptory challenges by prosecutors. To

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[9] DeStefano v. Woods, 392 U.S. 631 (1968), is not to the contrary. It is one thing to say that a judge's determinations are no less accurate and reliable than a jury's. But it is quite another to provide a jury and then ignore the fact that it has been tampered with in ways affecting directly its decision-making function. See Brown, 447 U.S. at 334 n. 13.

the contrary, it began its analysis with the observation that "Swain ... recognized that a 'State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause.'" Batson, 90 L.Ed.2d at 79 (quoting Swain v. Alabama, 380 U.S. at 203-04).

Although Batson did of course overrule Swain in part, it did so only with regard to the mode of proof to be employed in proving discriminatory use of the peremptory challenge. If prosecutors relied on the Swain standards, they relied on those standards not to justify their conduct but merely to insulate their knowingly impermissible conduct from effective review. This is not the kind of "good-faith reliance," Brown v. Louisiana, 447 U.S. at 335; DeStefano v. Woods, 392 U.S. 631, 634 (1968), that justifies

eternal insulation by means of a prospectivity rule.[10]

> No prosecutor could have been unaware
>
> that racial discrimination ... violates deeply and widely accepted views of elementary justice.... Over the past quarter of a century, every pronouncement of this Court and myriad Acts of Congress and Executive Orders attest a firm national policy to prohibit racial segregation and discrimination....

Bob Jones University v. United States, 461 U.S. 574, 592-93 (1983). Thus, in every case in which the defendant, pursuant to Batson, makes a prima facie case that the prosecutor used peremptory challenges to eliminate blacks for impermissible motives, it is necessarily true that there is reason to believe that the prosecutor knowingly

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[10] Certainly, no prosecutor who tried a case subsequent to the decisions respecting the denial of certiorari in McCray v. New York, 461 U.S. 961, 963 (1983)(Marshall and Brennan, JJ., dissenting from the denial of certiorari); id. at 961 (Stevens, Blackmun, and Powell, JJ., opinion respecting the denial of certiorari), could fail to be on notice that the practice was constitutionally suspect.

committed "a grave constitutional trespass." Vasquez v. Hillery, 88 L.Ed.2d at 608.

Second, even Batson's change in the evidentiary standard was not a "clear break" with past law. The Court's review in Batson of its intervening decisions regarding proof of impermissible racial motive conclusively demonstrates that Batson was foreshadowed in a host of cases. Where Swain had indicated that "an inference of purposeful discrimination would be raised on evidence that a prosecutor, 'in case after case, whatever the crime and whoever the defendant or the victim may be, is responsible for the removal of Negroes...,'" Batson, 90 L.Ed.2d at 84 (quoting Swain, 380 U.S. at 223), Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977), had made clear

> that "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act" is not "immunized by the absence of such discrimination in the making of other comparable decisions."

Batson, 90 L.Ed.2d at 87 (quoting Arlington Heights, 429 U.S. at 266, n. 14); see also Alexander v. Louisiana, 405 U.S. at 629-31.

Moreover, "[t]he standards for assessing a prima facie case in the context of discriminatory selection of the venire have been fully articulated since Swain." Batson, 90 L.Ed.2d at 87. It was "[t]hese principles" -- spelled out in the Court's cases from 1972 onward[11] -- which supported the "conclusion that a defendant may establish a prima facie case of

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[11] The Court cited and discussed Alexander v. Louisiana, 405 U.S. 625, 629-31 (1972); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)(Title VII); Washington v. Davis, 426 U.S. 229, 241-42 (1976); and Castaneda v. Partida, 430 U.S. 482, 494-95 (1977), as articulating the evidentiary standards to be applied. Batson, 90 L.Ed.2d at 87-88.

purposeful discrimination in selection of the petit jury solely on the evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." Id.

C. The Potential Effect on the Administration of Justice is not so Overwhelming as to Override the Foregoing Factors

The balance of considerations raised by the concern for the effect of Batson on the administration of justice is not so overwhelming as to override the concern for accuracy in the jury's decision-making process.

First, it is not clear that this factor points only in the direction of prospectivity. There are cases that raise the issue of discriminatory use of peremptories on records that meet the standards of either Batson or Swain. See, e.g., Evans v. Mississippi, No. 85-6932, cert. denied, 54 U.S.L.W. 3810 (June 9, 1986). Indeed, Brown may well be just such

a case.[12] It would be not only anamolous but wasteful to require the lower courts to hear such petitioners present the "case after case" evidence required by Swain when their claims might be proved more efficiently under the Batson standards.

Second, it is not at all clear that the number of Batson claims that properly were preserved in the state courts is so high that a general jail delivery is to be feared. See Wainwright v. Sykes, 433 U.S. 72 (1977); Hankerson v. North Carolina, 432 U.S. at 244 n. 8. For those who did not perserve the claim, it is unlikely that

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[12] In his concurring opinion in Batson, Justice White explained that even under Swain it would be proper for a trial judge to invalidate the prosecutor's use of peremptories in a case in which he or she admitted to doing so on the basis of race, especially if the defendant is black. Batson, 90 L.Ed.2d at 90 n. *. In Brown, the Assistant United States Attorney ultimately admitted to the trial judge that: "I said 'We would like to have as few black jurors as possible,' which is exactly either I'm sure what I said or close to it...." Appendix D to the Petition for Certiorari in No. 85-5731, at 70.

they will be able to show cause; the very cases that warned prosecutors of the illegality of the practice also provided the tools for competent counsel to raise and preserve the claim. See Engle v. Isaac, 456 U.S. 107 (1982). Moreover, the lower courts may properly limit consideration to only those cases in which there is an adequate proffer of evidence to suggest a prima facie case. See. e.g., Esquivel v. McCotter, 791 F.2d 350, 351 (5th Cir. 1986) (state court found that no Spanish-surnamed jurors were struck).

In any event, the Court has never held that a practice which strongly implicates the truth-finding process will nevertheless be given retroactive condonation simply because of the the widespread nature of the violation. See Hankerson v. North Carolina, 432 U.S. at 243.

II. THE NATURE OF THE SENTENCING DECISION IN CAPITAL CASES IS SUCH THAT THE EXCLUSION OF MINORITIES FROM THE JURY NECESSARILY DIMINISHES ITS RELIABILITY, REQUIRING RETROACTIVE APPLICATION OF BATSON TO CAPITAL SENTENCING PROCEEDINGS

The nature of the capital sentencing decision made by a jury calls for the retroactive application of Batson because of the "unacceptable risk ... infecting the capital sentencing proceeding...," Turner v. Murrray, 476 U.S. ___, 90 L.Ed.2d 27, 37 (1986) (emphasis in original), that results from the exclusion of minorities from sentencing juries. This unacceptable risk arises in two separate ways.

"In a capital sentencing proceeding before a jury, the jury is called upon to make a 'highly subjective, "unique, individualized judgment regarding the punishment that a particular person deserves."'" Turner, 90 L.Ed.2d at 35 (quoting Caldwell v. Mississippi, 472 U.S. ___, 86 L.Ed.2d 231, 247 n. 7 (1985), and

Zant v. Stephens, 462 U.S. 862, 900 (1983)(Rehnquist, J., concurring)). Because "[i]t is entirely fitting for the moral, factual, and legal judgment of judges and juries to play a meaningful role in sentencing..., sentencers will exercise their discretion in their own way and to the best of their ability." Barclay v. Florida, 463 U.S. 939, 950(1983)(plurality opinion). "The sentencing process assumes that the trier of fact will exercise judgment in light of his or her background, experiences, and values." Id. at 970 (Stevens and Powell, JJ., concurring).

Given the inherently subjective, value-laden nature of the capital sentencing determination, there is risk of substantial inaccuracy and unreliability in the death verdict imposed or recommended by a jury from which minorities were purged. This risk arises in two ways. First, "[b]ecause of the range of discretion entrusted to a

jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected." Turner, 90 L.Ed.2d at 35. The impermissible removal of black potential jurors from the jury room removes one of the best -- if not the best -- means of curbing such abuse: The presence of a black juror provides both a means to unmask prejudice should it creep into the jury room and a powerful deterrent against its entry.

Second, the very function of a jury in a capital case is to serve as a "link between contemporary community values and the penal system -- a link without which the determination of punishment could hardly reflect the 'evolving standards of decency that mark the progress of a maturing society.'" Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion)(quoting Trop v. Dulles, 356 U.S.

86, 101 (1958)). That link is destroyed when important segments of the community are deliberately and impermissibly excluded. All the reasons that demonstrate that the exclusion of blacks from the guilt/innocence stage of the trial affects the decision-making process apply with greater force to the sentencing decision, which more openly calls for the exercise of discretion and the interpolation of values in the application of the law.

The Court recognized as much in Witherspoon v. Illinois, 391 U.S. 510 (1968) -- concerning the exclusion of individual jurors because of their values regarding capital punishment -- where it held that decision entirely retroactive. Id. at 523 n. 22. See also Davis v. Georgia, 429 U.S. 122 (1976) (improper exclusion of single Witherspoon juror requires reversal). So too, in capital cases in which the prosecution used its

peremptories impermissibly to remove blacks --and to a much greater degree -- "the jury selection standards employed ... necessarily undermined 'the very integrity of the ... process' that decided the petitioner's fate ... requiring the fully retroactive application of..."[13] Batson to capital sentencing proceedings.

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[13] Witherspoon, 391 U.S. at 523 n. 22 (quoting Linkletter, 381 U.S. at 639).

CONCLUSION

For the foregoing reasons, the judgments of the courts below should be reversed.

Respectfully submitted,

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No. 85-5221 (11)

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1986

RANDALL LAMONT GRIFFITH,
Petitioner

v.

COMMONWEALTH OF KENTUCKY,
Respondent

ON WRIT OF CERTIORARI TO THE KENTUCKY SUPREME COURT

BRIEF AMICI CURIAE IN SUPPORT OF THE RESPONDENT BY THE NORTH CAROLINA ATTORNEY GENERAL AND THE 21 AMICI THAT APPEAR ON THE INSIDE COVER

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Utah by David L. Wilkinson, Attorney General
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QUESTION PRESENTED

SHOULD THE HOLDING IN ***BATSON v. KENTUCKY***, 476 U.S. ____ (1986), BE GIVEN RETROACTIVE EFFECT IN CASES PENDING ON DIRECT APPEAL?

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BRIEF OF THE AMICI STATES IN SUPPORT OF RESPONDENT COMMONWEALTH OF KENTUCKY

INTEREST OF THE AMICI CURIAE

The ***amici curiae*** are States which have, in the administration of their systems of justice, relied on the holding in ***Swain v. Alabama*** in regulating the use by the State of the State's peremptory challenges in cases and whose court systems will be seriously disrupted by a retroactive application of ***Batson v. Kentucky***.

STATEMENT OF THE CASE

The ***amici*** States adopt the Statement of Case as set forth by the respondent Commonwealth of Kentucky.

SUMMARY OF THE ARGUMENT

Swain v. Alabama, correctly or incorrectly, was perceived by the State and lower Federal Courts to hold that a prosecutor, without violating the Equal Protection Clause of the Constitution, could, on a case specific basis, challenge blacks or other minorities on the basis of race. ***Batson v. Kentucky*** has prohibited such conduct and has radically changed the evidentiary burden of a defendant in showing an Equal Protection Violation based on the prosecutor's use of peremptory challenges.

Batson v. Kentucky represents a "clear break" with past precedent and therefore, under the threshold test set out in ***United States v. Johnson***, should be given prospective effect only.

If the retroactivity issue is determined by resorting to the three factor test of ***Stovall v. Denno***, the decision of ***Batson*** still should be deemed by this Court to be prospective in effect only. None of the three factors favors holding ***Batson*** retroactive.

In ***Allen v. Hardy*** this Court assumed ***Batson*** had some impact on the truth finding function of the jury. However, even as to capital cases, due to the other safeguards in place in a trial, the decision in ***Batson*** will have no substantial impact on the truth finding function of the jury.

Prosecutors and State Courts relied on the apparent holding in ***Swain*** dealing with both when the Constitution is violated by a prosecutor's conduct and what evidentiary showing must be made to prove an Equal Protection violation. The interpretation of ***Swain*** by the prosecutors that the Equal Protection Clause permitted case specific peremptory challenges based on race is not unreasonable since that view of ***Swain*** was also held by the State and Federal Courts, as well as the legal commentators who reviewed the issue.

Finally, the impact of a retroactive application of ***Batson***, even when limited to cases now pending on direct appeal, will be significant. Due to the changes made by ***Batson*** as to the defendant and prosecutor must show in litigating an Equal Protection violation claim, the vast majority of the cases containing a ***Batson*** issue will have to be remanded for an evidentiary hearing. Since the prosecutor likely will be unable, several years after a ***voir dire***, to explain why he used his peremptories in the manner he did, many new trials must be granted in cases. Victims and witnesses will once more be required to undergo the inconvenience and trauma of testifying. Thus, the impact on the system of justice will be significant. The ***Stovall v. Denno*** test, like the "clear break" threshold rule of ***United States v. Johnson*** mandate that ***Batson v. Kentucky*** not be given retroactive effect for those cases now pending on direct appeal.

ARGUMENT

IN CASES PENDING ON DIRECT APPEAL *BATSON V. KENTUCKY* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

In 1965, in ***Swain v. Alabama***, 380 U.S. 202 (1965), in an opinion written by Justice White, this Court stated in Part II of the opinion that:

> "...we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant

and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature of the operation of the challenge...

In light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." 380 U.S. at 222.

The Court's holding in Part II of ***Swain*** was subsequently universally viewed by the State and Federal Courts, as well as by legal commentators, as holding that a prosecutor's use of the peremptory challenge in a single case to remove blacks from the venire was not a violation of the Equal Protection Clause of the Constitution. See "***Use Of The Peremptory Challenge***", 79 ALR3d 14, §3, p. 27 (1977). Johnson, ***Black Innocence And The White Juror***, 83 Michigan Law Review 1611 (1985). ("Under ***Swain v. Alabama***, a prosecutor may deliberately use his peremptory challenges to exclude all blacks from a jury trying a black defendant", p. 1614); ***McCray v. New York***, 461 U.S. 961, 964 (1983). ("In ***Swain***, a closely divided Court held that the prosecutor's use of peremptory challenges to strike Negroes from the jury panel in one particular case did not deny the defendant equal protection of the laws.") (Marshall, J. dissenting from denial of certiorari); ***Thompson v. United States***, ___U.S. ____, 105 S.Ct. 443 (1984); ("***Swain*** - whose rule, if without other virtue, was at least clear...") p. 446; (Brennan, J. dissenting from denial of certiorari).

The State Courts which declined to follow ***Swain***, on the basis of State constitutional protections, asserted that ***Swain*** held that a prosecutor could, without violating the Equal Protection Clause, strike a black juror on the basis of his race from the venire in a particular case if that strike was for a trial purpose. ***People v. Wheeler***, 22 Cal.3d 258, 148

Cal. Rptr. 890, 583 P.2d 748 (1978); ***Commonwealth v. Soares***, 377 Mass. 461, 387 N.C.2d 499 (1979); ***State v. Crespin***, 94 N.M. 486, 612 P.2d 716 (N.M. App. 1980). Even after certiorari had been granted in the case of ***Batson v. Kentucky***, ____ U.S. ___, 105 S.Ct. 2111 on April 22, 1985, the Fifth Circuit, en banc, in ***United States v. Leslie***, 783 F.2d 541 (1986) reaffirmed its adherence to ***Swain***. In so doing, the Fifth Circuit stated, "Plainly, the Supreme Court in ***Swain*** held that a prosecutor may peremptorily challenge on racial (or similar group) grounds so long as he does so on 'considerations related to the case he is trying, the particular defendant involved and the particular crime charged' ***Swain***." 783 F.2d at 548.

On April 30, 1986, this Court announced its decision in ***Batson v. Kentucky***, ____U.S.____, 106 S.Ct. 1712 (1986). In this case the majority side stepped the Sixth Amendment issue which was the basis for the grant of certiorari and instead held that it is a violation of the Equal Protection Clause for a prosecutor in a particular case peremptorily to excuse from a jury blacks solely on the basis of race when the defendant is black. The Court specifically stated that to the extent ***Swain*** was inconsistent with ***Batson***, ***Swain*** was overruled. 106 S.Ct. at 1725, n.25.

The ***amici*** represent states whose courts had relied upon ***Swain v. Alabama*** and the continued body of case law which had reaffirmed the validity of ***Swain*** in ruling on equal protection claims based on use of a prosecutor's peremptory challenge and whose prosecutors had relied upon ***Swain*** and its progency in exercising their peremptory challenges in a manner they felt consistent with representing the State in a particular case. ***Batson v. Kentucky***, ***supra*** is now the law and will be scrupulously followed. However, due to the substantial break with past precedent contained in ***Batson***, the ***amici*** assert that ***Batson*** should not be applied retroactively to cases now pending on direct appeal in the State and Federal Courts.

1. UNDER THE "CLEAR BREAK" STANDARD OF *UNITED STATES V. JOHNSON, BATSON* SHOULD NOT BE GIVEN RETROACTIVE EFFECT.

As noted in ***State v. Jackson***, ____N.C.____, 343 S.E.2d 814 (1986), "the Supreme Court has not been completely consistent in its approach to the question [of retroactivity]". However, it would appear that as to those cases to which finality[1] has attached the three factors set out in ***Stovall v. Denno***, 388 U.S. 293 (1967) are applied to determine the appropriateness of retroactivity of a new rule of the Court to a case pending in a collateral proceeding. ***See Solem v. Stumes***, 465 U.S. 638 (1984), ***Allen v. Hardy***, _ U.S __, 106 S.Ct. 2878 (1986) (per curiam). In matters not final at the time of the ruling, the approach to retroactivity principles employed in ***United States v. Johnson***, 457 U.S. 538 (1982) and ***Shea v. Louisiana***, ___U.S.___, 105 S.Ct. 1065 (1985) should be applied.

In ***United States v. Johnson***, ***supra***, the court reviewed its prior retroactivity decisions and stated that an analysis of post ***Linkletter***[2] cases established that the answer to retroactivity in three narrow categories of cases was not determined by ***Stovall*** criteria, but rather through the application of a threshold test. If the decision merely applied settled precedents to new and different factual situations, application

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[1]The Court has defined final to mean where judgment of conviction was rendered, availability of appeal exhausted, and time for petition for certiorari had either elapsed or certiorari had been denied before the decision. ***Linkletter v. Walker***, 381 U.S. 618 (1965).

[2]***Linkletter v. Walker***, 381 U.S. 618 (1965). After determining retroactivity was neither required or forbidden by the Constitution, the Court in ***Linkletter***, stated it was necessary to "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation to determine whether retroactive application was called for."

of the rule will be retroactive. ***See, for instance: Dunaway v. New York***, 422 U.S. 200 (1979). Also, retroactive effect must be given to a ruling that a trial court lacked the basic authority to convict or punish. ***See Furman v. Georgia***, 408 U.S. 238 (1972). Where, however, the case announces an entirely new and unanticipated principle of law - a clear break with the past - the decision will almost invariably be applied prospectively only. A "clear break" has been recognized only when a decision explicity overrules a past precedent of the Court, or disapproves a practice the Supreme Court arguably had sanctioned in prior cases or overturned a long standing and wide spread practice to which the Court has not spoken, but which a near unanimous body of lower Court authority expressly approved. The precedent upon which this "clear break" rule was fashioned was earlier described as a decision which "constituted a sharp break in the line of earlier authority or an avulsive change which caused the current of the law thereafter to flow between new banks." ***United States v. Peltier***, 422 U.S. 531, 544 (Brennan, I., dissenting). Likewise, in ***Solem v. Stumes***, 465 U.S. 638 (1984) the Court commented on the concept of "clear break". The Court noted that because ***Edwards v. Arizona***, 451 U.S. 477 (1981) did not "overrule any prior decision or transform standard practice... it [was] not the sort of 'clear break' case that is almost automatically non-retroactive." 465 U.S. at 647.

Under the "clear break" rule set out in ***United States v. Johnson, supra***, (derived from prior precedent of the Court, obliquely recognized in ***Stumes***, and expanded beyond the scope of the Fourth Amendment by ***Shea***), ***Batson***, by its overruling of ***Swain v. Alabama***, is precisely the type of clear break case which should be given prosepctive application only.[3] See: ***Daniel v. Louisiana***, 420 U.S. 31 (1975)

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[3]The State cases which have examined the retroactivity issue in ***Batson*** have generally deemed ***Batson*** to be nonretroactive on the basis of "clear break". ***State v. Jackson, supra***. (***Batson*** is a clear break case since it "explicity rejected to the prior ***Swain*** requirement and unequivocally overruled ***Swain***.)" 343 S.E.2d at 825). ***Bowden v. Kemp***, 256 Ga. 70, 344 S.E.2d 233 (1986). ("The Supreme Court of the United States did

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(Ruling forbidding exclusion of women from juries not to be applied retroactively); ***Gosa v. Mayden***, 413 U.S. 665 (1973), (Ruling granting civilian trials to military personnel accused of non service related crimes not to be applied retroactively), ***De Stefano v. Woods***, 391 U.S. 145 (1968) (Ruling guaranteeing a right to a jury trial in certain cases not to be applied retroactively).

Griffith and his ***amici*** suggest that ***Batson*** cannot be deemed a "clear break" both because it was allegedly foreshadowed by a series of State and Federal cases and because ***Batson*** merely redefines a procedural, evidentiary burden. Such a view of ***Batson*** is untenable. In ***Allen v. Hardy***, a majority of this Court recognized ***Batson*** to be "an explicit and substantial break with prior precedent." 106 S.Ct. at 2879. ***Batson v. Kentucky, supra***, (White, J. concurring).

While ***McCray v. New York***, 461 U.S. 961 (1983) (denial of certiorari) and several state and federal cases certainly suggested that ***Swain*** was becoming the target of criticism, no State or Federal case had, on the basis of federal law, claimed that ***Swain*** no longer controlled how an equal protection claim on the basis of peremptory challenges was to be decided. ***See, for instance Booker v. Jabe***, 775 F.2d 76[illegible] (6th Cir. 1985) remanded ***sub nom Michigan v. Booker***, No. 85-1028 (June 30, 1986); ***People v. Wheeler, supra***. The fact that the overruling of ***Swain*** might have been urged by

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continued from above
not hold ***Batson*** to apply retroactively and we do not view it as being so intended." 344 S.E.2d at 234); ***State v. Wagster***, 489 So.2d 1299 (La. App. 1986). ***State v. Calvin Hawkins***, ___S.C.___, ___S.E.2d ___(June 6, 1986). Likewise, the Fifth Circuit Court of Appeals held ***Batson*** nonretroactive on collateral review in several death penalty cases due to ***Batson's*** substantial departure from prior precedent. ***Smith v. McCotter***, 86-1615, ___F.2d ___(1986), ***stay denied***, ___U.S.___, (August 21, 1986); ***Esquivel v. McCotter***, 791 F.2d 350 (5th Cir.), ***cert. denied***, ___U.S.___, 106 S.Ct. 2294 (1986). ***See also Simpson v. Massachusetts***, 795 F.2d 216 (1st Cir. 1986). Other States are presently litigating the retroactivity issue. ***See People v. Kirk***, 98 Ill, Dec. 64, 493 N.E.2d 1085 (1986). Some others have simply assumed retroactivity without examining the issue. ***People v. Hockett***, 503 N.Y.S.2d 995 (1986); ***Saadig v. State***, 387 N.W.2d 315 (1986).

commentators or lower court dicta does not in any way make ***Batson*** less a "clear break". ***See, e.g. Desist v. United States***, 394 U.S. 244 (1969).

Likewise, Griffin's claim that ***Batson***, being a mere realignment of an evidentiary standard dealing with a known constitutional principle, is not a "clear break" case is meritless. On this logic ***Katz v. United States***, 389 U.S. 347 (1967) being a mere shifting of an evidentiary standard dealing with a known constitutional principle - The Fourth Amendment - would also have required retroactive application. ***See Desist v. United States, supra***. The fact remains, as this Court stated in ***Allen v. Hardy***, "the rule in ***Batson v. Kentucky*** is an explicit and substantial break with past precedent", 106 S.Ct 2880. As such, it is a "clear break" case and under ***United States v. Johnson***, and ***Shea v. Louisiana***, is entitled to prospective application even as to cases presently pending on direct appeal.

2. *STOVALL V. DENNO* CRITERIA ALSO MANDATE PROSPECTIVE APPLICATION OF *BATSON*.

The ***amici*** assert that the principles set out in ***United States v. Johnson*** are the rules by which retroactivity should be determined. However, assuming the ***Stovall v. Denno***[4] three part test is the appropriate measure to use in determining retroactivity instead of the "clear break" analysis in ***United States v. Johnson***, ***Batson*** still requires prospective application.

A. THE PURPOSE TO BE SERVED BY THE NEW STANDARD.

The first prong of the ***Stovall*** criteria examines the purpose for the new standard. Complete retroactive effect is most appropriate where a new constitutional principle is

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[4]Justice Burger, dissenting in ***Batson v. Kentucky***, employed the ***Stovall*** criteria in showing the necessity for prospective application only of ***Batson***.

"designed to avert the clear danger of convicting the innocent." ***Tehan v. Shott***, 382 U.S. 406, 416 (1966). "Where the ***major*** purpose of new constitutional doctrine is to overcome an aspect of the criminal trial that ***substantially*** impairs its truth-finding function and so raises serious questions about the accuracy of guilty verdicts in past trials, the new rule frequently has been given complete retroactive effect." ***Williams v. United States***, 401 U.S. 646, 653 (1971). (Emphasis added). However, as emphasized, the impairment to truthfinding must be substantial, and not simply incidental to the main basis for the new standard.

Retroactivity is not required by a determination "that the old standard was not the most effective vehicle for ascertaining the truth, or that the truth determining process has been aided somewhat by the new standard, or that one of several purposes in formulating the new standard was to avoid distortion in the process." ***Gosa v. Mayden***, 413 U.S. at 680.

Batson does have some "bearing on the truth finding function of a criminal trial". ***Allen v. Hardy***, 106 SCt at 2880. This, however, is not the major purpose for the new standard enuciated in ***Batson***. The decision mainly serves other values - strengthing the public confidence in the administration of justice and protecting minority citizens called into jury panels from discrimination by the State. ***Batson v. Kentucky, supra***.

Whether a Constitutional rule of criminal procedure sufficiently enhances the reliability of the truth finding process to require retroactive application is necessarily a matter of degree. ***Johnson v. New Jersey***, 384 U.S. 719 (1966). The cases in which this Court has found such a substantial effect on the accuracy of the truth finding process have generally involved those issues either giving an accused the ability to present his case effectively. [***See Arsenault v. Massachusetts***, 393 U.S. 314 (1969)]; or placing of fundamental burdens of proof on an accused. [***Hankerson v. North Carolina***, 432 U.S. 233 (1977); ***Ivan v. City of New York***, 407 U.S. 203 (1972).] ***Batson*** simply does not deal with an issue which has the type of profound impact on the truth finding function that is present in those cases where this

Court has ordered complete retroactivity such as ***Hankerson***, ***Furman***, or ***Gideon v. Wainwright***, 372 U.S. 335 (1963).

Amici for Griffith point to studies which indicate blacks are more likely to be for the "underdog" and suggest these studies mandate a finding that the truth finding function had been substantially impaired by pre-***Batson*** practice since blacks, allegedly, are more likely to find an accused innocent. The studies relied upon by Griffin are generally over ten years old and are based on suspect methodology. ***See Lockhart v. McCree***, ___U.S.___, 106 S.Ct. 1758 (1986). However, even if the studies are worthy of some consideration, they do not require a finding that peremptory strikes of blacks substantially impair the truth finding process. The studies are no more compelling than the sociological studies presented in the case of ***Taylor v. Louisiana***, 419 U.S. 522 (1975) which caused this Court to conclude, at footnote 12 "...Controlled studies of the performance of women as jurors conducted subsequent to Ballard have concluded that women bring to juries their own perspectives and values that influence both jury deliberation and result." 419 U.S. at 532. ***Taylor***, in ***Daniel v. Louisiana***, 420 U.S. 31 (1975) was given prospective application only. In ***Gosa v. Mayden***, ***supra***, this Court refused to hold retroactive the Court's decision granting military personnel the right to a civilian trial with all of the added procedural protections afforded by a civilian trial. In ***De Stefano v. Woods***, 392 U.S. 631 (1968), the Court refused to hold retroactive the right to a jury trial in some cases. This Court also refused to give retroactive effect to its ruling in ***Bloom v. Illinois***, 391 U.S. 194 (1968) which extended the right to jury trials in serious criminal contempt situations. These cases clearly had as much, if not more, impact on the truth finding function of a trial as does the new standard in ***Batson***.

If the right to a civilian jury trial, and the right to have women - 53% of the population - on a jury are not matters substantially impairing the truth finding function, then the peremptory exclusion of one or more minority citizens from a petit jury cannot be so deemed. A defendant is not entitled to a sympathetic jury - only a fair one. ***Lockhart v. McCree***, ***supra***. Nothing presented by Griffith shows the juries selected under pre ***Batson*** procedures were unfair.

The *amici* for Griffith suggest that, notwithstanding other criminal cases, the capital punishment cases mandate that ***Batson*** be made retroactive on cases pending direct appeal because of the "unacceptable risk...infecting the ***capital sentencing proceeding***... ***Turner v. Murray***, 476 U.S. , 90 L.Ed.2d 27, that results from the exclusion of minorities from capital juries." Brief of Amici, NAACP Legal Defense Fund and American Jewish Congress, p.33. However, while a sentencing jury does make a "highly subjective, unique, individualized judgment regarding punishment that a particular person deserves", ***Caldwell v. Mississippi***, 472 U.S. n.7, 105 S.Ct. 2633, 2645-46 n.7 (1985); ***Turner v. Murray***, 476 U.S. , 106 S.Ct. 1683, 1687 (1986), this does not raise an unacceptable risk that a ***Batson*** violation will have a substantial impact on the sentence imposed.

In ***Allen v. Hardy*** this Court acknowledged the rule in ***Batson*** "may have some bearing on the truth finding function of a criminal trial." 106 SCt. 2880. The question, however of "whether a constitutional rule of criminal procedure does or does not enhance the reliability of the fact finding process is necessarily a matter of degree..." ***Johnson v. New Jersey***, 384 U.S. 719, 728 (1966). This Court stated that, in determining retroactivity, the Court "must take into account, among other factors, of the extent to which other safeguards are available to protect the integrity of the truth determining process at trial". 384 U.S. at 729, ***see also, Gosa v. Mayden, supra***. Looking at the other factors in place at the time of trial of these pre-***Batson*** cases, there is no unacceptable risk that a sentence of death has been inappropriately meted out in any case where peremptory excusal of blacks from the petit jury had occurred.

A prosecutor's peremptory strikes are not the only factor molding a capital sentencing jury. The defense counsel, who possesses at least an equal number and often a larger number of peremptory challenges[5], is also exercising strikes in a manner he perceives is calculated to bring about the seating of a jury sympathetic to his point of view. The Trial Court likewise constitutes a safeguard against an aberrant

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[5]Ky. Rule Crim. Proc. 9.36, 9.38, 9.40

jury verdict. The Court oversees the ***voir dire*** and may exercise, where appropriate, his authority to uncover bias among potential jurors. Prior to ***Turner v. Murray***, ___U.S.___, 106 S.Ct. 1683 (1986), the trial court had the duty in certain cases to allow ***voir dire*** into possible racial prejudice of the potential jurors, ***Ham v. South Carolina***, 409 U.S. 524 (1973) and always had the discretion to inquire into racial prejudice even absent a showing "that racial prejudice might infect [the] trial". ***Ristaino v. Ross***, 424 U.S. 589 (1976). The Court also exercises his supervisory authority during trial to ensure a fair trial. The sentencing hearing itself, while more subjective than a guilt determination, requires a jury[6] to consider a series of specific questions reaching their sentencing decision thus guiding the jury's discretion in non-racial channels. *See* ***Gregg v. Georgia***, 428 U.S. 153 (1976). ***Jurek v. Texas***, 428 U.S. 262 (1976). The Court's instructions to the jury in death sentencing procedures contain admonitions to the jurors with respect to the necessity to be impartial.

Finally, the majority of the States have by case law, court rule, or statute, mandated porportionality review of the sentences of death imposed by the trial courts. ***Pulley v. Harris***, 465 U.S. 37 (1984). These statutes generally specifically require that the case be reviewed by the Appellate Court

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[6]In some States, Judges, not juries make the final punishment determination in a capital case. Obviously capital sentences from these States cannot be deemed tainted by possible ***Batson*** error. Alabama, Ala. Code § 13A-5-45 (1982); Arizona, Ariz. Rev. Stat. Ann. § 13-703(B) (1985); Florida, Fla. Stat. § 921.141(3) (1970); Indiana, Ind. Code § 35-50-2-9(e) (1986 Cum. Supp.); Montana, Mont. Code Ann. § 46-18-30 (1985 Supp.); Nebraska, Neb. Rev. Stat. § 29-2520 (1985). In other States, the trial courts may set aside the jury's sentencing judgments. See, for instance, California, Cal. Penal Code § 190.4(e) (1977); Arkansas, Ark. Stat. Ann. § 43-2301 (Supp. 1973, Supp. 1975); Colorado, Colo. Rev. Stat. § 16-11-103(1)(a) (1985 Cum. Supp.); Virginia, Va. Code § 19.2-264.5 (1983).

to ensure that arbitiariness, passion, or prejudice did not play a role in the sentence of death.[7]

Porportionality review alone "substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury." ***Gregg v. Georgia***, 428 U.S. at 206; (Stewart J, plurality). Thus, the other safeguards in place during a sentencing hearing are sufficient to guard the integrity of the sentencing process in pre-***Batson*** capital cases.

The only basis for suggesting the capital sentencing had been impaired by pre-***Batson*** practices comes from the sociological studies cited by Griffith and his ***amici***. However, these studies are simply too old and too suspect due to methodology used to serve as a basis for this Court's determining ***Batson*** must be applied retroactively in the capital cases in the face of these other substantial safeguards which ensure reliable sentencing decisions. This Court, on at least two occasions, has allowed an execution to proceed despite the existence of a ***Batson*** claim made on collateral review. ***Larry Smith v. McCotter***, 86-1615, ___F.2d. ____ (5th Cir.

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[7]Ala. Code § 13A-5-53(b)(1) (1982); ***State v. Vickers***, 129 Ariz. 506, 633 P.2d 315 (1981); ***Collins v. State***, 261 Ark. 195, 548 S.W.2d 106 (1977); Colo. Rev. Stat. § 16-11-103(7)(b) (1985 Cum. Supp.); Conn. Gen. Stat. Ann. § 53a-46b(b) (1985); Del. Code Ann. 11 § 4209(g)(2)(a) (1979); Ga. Code Ann. § 17-10-35(c)(1) (1982); ***People v. Fetterly***, 710 P.2d 1202 (Idaho, 1985); Ill. Ann. Stat. 38 § 9-1(i) (Smith-Hurd 1986 Supp.); Ind. Code Ann. § 35-50-2-9(h) (Burns 1986 Cum. Supp.); Ky. Rev. Stat. § 532-075(3)(a) (1984); La. Code. Crim. Proc. Ann. § 905.9 (West 1984); Md. Code Ann. 27 § 414(e)(1) (1982); Miss. Code Ann. § 99-19-105(3)(a) (1985) Cum. Supp.); Mo. Ann. Stat. § 38-565.035(3)(1) (Vernon 1986 Cum. Supp.); Mont. Code Ann. § 46-18-310(1) (1985); Neb. Rev. Stat. § 29-2521.03 (1985); Nev. Rev. Stat. § 177.055(2)(c) (1985); N.H. Rev. Stat. Ann. § 630.5(vii)(9) (1983 Cum. Supp.); N.J. Rev. Stat. § 2c.11-3(e) (1986 Cum. Supp.); N.M. Stat. Ann. § 30-20A -4(c)(3) (1978); N.C. Gen. Stat. § 15A-2000(d)(2) (1983); Okla. Stat. Ann. 21 § 701.13(c)(1) (1983); 42 Pa. Cons. Stat. Ann. § 9711(h)(3)(i) (1982); S.C. Code Ann. § 16-3-25(c) (1976); Tenn. Code ann. § 39-2-205(c) (1982); ***State v. Wood***, 648 P.2d 71 (Utah, 1982); Va. Code § 17-110(c)(1) (1986 Cum. Supp.); Wyo. Stat. § 6-2-103(d) (1977).

1986), ***stay denied***, ____U.S. ____(August 21, 1986). ***Esquivel v. McCotter***, 791 F.2d 350 (5th Cir. 1986), ***cert. denied***, ____U.S. ____, 106 S.Ct. 2294 (1986). These cases alone indicate that this Court has already determined on collateral review what the States now claim - that ***Batson*** has no substantial influence on the truth finding function of a jury even in a capital proceeding. Thus, the first prong of the ***Stovall v. Denno*** test fully supports a prospective application of ***Batson***.

B. LAW ENFORCEMENT OFFICIALS JUSTIFIABLY RELIED ON THE OLD STANDARD IN *SWAIN*.

The second prong of the ***Stovall*** test requires the Court to consider the extent of the reliance by law enforcemnt authorities on the old standards. The ***amici*** States contend the reliance prong mandates prospective application of ***Batson***.

As the case law from all the Federal circuits and the State courts indicate, up until the day ***Batson*** was decided, the courts and prosecutors relied on the ***Swain*** standard. ***See, for instance United States v. Leslie, supra. See also Batson v. Kentucky, supra***, 106 S.Ct. at 1714-1715, n.1 (1986). "There is no question that prosecutors, trial judges, and appellate courts throughout our State and Federal systems justifiably have relied on the standard of ***Swain***." ***Allen v. Hardy***, 106 S.Ct. 2881. Such reliance by law enforcement on the ***Swain*** decision strongly supports the prospective application of ***Batson***.

Griffith and his amici suggest, however, the States are not entitled to reliance on past precedent since ***Swain*** was simply being used to cloak prosecutors' racist use of peremptory challenges - a practice forbidden under ***Strauder v. West Virginia***, 100 U.S. 303 (1880). Thus, opine Griffith's amici, prosecutors cynically used the exceedingly burdensome evidentiary standard suggested in Part III of ***Swain*** to insulate themselves from what they knew to be the improper use of peremptory strikes and should not be given the benefit of prospective application of ***Batson***.

As noted earlier, the almost universal interpretation of ***Swain v. Alabama*** was that a prosecutor could, without violating constitutional guarantees of the Equal Protection Clause, peremptorily excuse blacks in a particular case if the prosecutor felt on a case specific basis that a black juror would be unfavorable to the State. ***See, for instance McCray v. New York***, 461 U.S. 961, 964 (1983) (Marshall, J. dissenting). Thus, the fact that a prosecutor in a particular case may have used race as a basis for removing a juror from the petit jury where the prosecutor felt this was proper for the case's outcome does not show a disregard for the Constitution as interpreted by this Court in ***Swain*** any more than the defense lawyer who struck all whites in a case on the assumption whites would be more harsh on a black defendant showed a disrespect for the Constitution. Rather, it simply shows a reasonable reliance - now shown to be wrong - on the apparent holding of this Court and the lower Courts which have interpreted ***Swain***. The Griffith's amici's argument that prosecutors acted in bad faith, then, simply will not hold up to analysis.

Nor is a prosecutor's - or a lower court's - reliance on ***Swain*** unreasonable in the face of the expressions of discontent about ***Swain*** which began to appear with increasing frequency in the last ten years and in the face of the grand jury cases dealing with equal protection claims. The State and Federal Circuit Courts continued to reaffirm ***Swain's*** validity. This Court continued to deny certiorari in cases raising ***Swain*** as an issue. ***See, for instance, Gilliard v. Mississippi***, 464 U.S. 867 (1983) (denial of certiorari); ***Thompson v. United States, supra***, (denial of certiorari); ***McCray v. New York, supra***, (denial of certiorari). This Court continued to cite ***Swain*** with apparent approval, ***Regents of University of California v. Bakke***, 438 U.S. 265, 319, n.53 (1978) or distinguish ***Swain*** without suggesting its invalidity, ***Castaneda v. Partida***, 430 U.S. 482, 502, n.1 (1977) (Marshall, J. concurring).

The fact that ***Swain*** was much criticized in cases and by legal commentators cannot render law enforcement's reliance on ***Swain's*** apparent holding unreasonable. Prosecutors and State Court Judges ought not be charged with the duty to divine when prior precedent of this Court will be

changed simply on the basis of criticism of that prior precedent. The Blackstonian notion that "the duty of the Court was not to pronounce a new law, but to maintain and expound the old one", ***United States v. Johnson, supra***, 542, 1 W. Blackstone Commentaries 69 (15th ed. 1809), is equally applicable to the State's prosecutors and lower State and Federal courts.

The reliance on the ***Swain v. Alabama*** holding obviously has left the majority of prosecutors unprepared to defend their use of peremptory strikes under the ***Batson*** standards. What ***Swain*** apparently approved in Part II of the decision, ***Batson*** now deems unconstitutional. In face of the overwhelming case law and commentary supporting the view that ***Swain***, as a matter of substantive constitutional law allowed challenging blacks due to their race in a particular case if the challenge was related to a prosecutor's view of the outcome of the case, this Court should recognize that prosecutors and lower courts were acting in good faith in relying on ***Swain***. This Court should hold that this reliance mitigates against retroactive application of ***Batson***.

C. RETROACTIVE APPLICATION OF THE *BATSON* DECISION WOULD SERIOUSLY DISRUPT THE ADMINISTRATION OF JUSTICE.

The last prong of the three part ***Stovall*** test requires an analysis of "(c) the effect on the administration of justice of a retroactive application of the new standards." ***Stovall v. Denno***, 388 U.S. at 297. This criteria also requires a prospective application of ***Batson*** even as to cases now pending on direct appeal.

This Court has already recognized that "retroactive application of the ***Batson*** rule on collateral review of final convictions would seriously disrupt the administration of justice." ***Allen v. Hardy, supra***, 106 S.Ct. at 2881. While ***Allen v. Hardy*** has relieved the States from the obligation of litigating the use of challenges on collateral review, holding ***Batson*** retroactive for cases still pending on direct review will have a profound impact on the Court systems in the ***amici*** states. In ***Stovall*** the Court, in holding ***United States v.***

Wade, 388 U.S. 218 (1967) nonretroactive, relied on the fact that numerous hearings would have to be held "with problems of unavailability of witnesses and dim memories". 388 U.S. at 300. This concern is no less real in the present matter before the Court. The evidentiary standards for proving an equal protection violation in jury selection have been radically shifted. Cases in which the offers of proof were adequate to suffice as to a ***Swain*** claim are now clearly inadequate. ***See State v. Jackson***, ***supra***. Since it would appear that the proof of a prima facie case can be made even if all the jurors finally seated are not white, see ***Commonwealth v. Soares***, ***supra***, and since it appears that using the majority of the States' challenges in a case on black jurors alone raises a prima facie presumption of discrimination, ***Batson v. Kentucky***, the vast majority of cases now raising a ***Batson*** claim will have to be remanded to the trial courts for hearings. This will obviously engender a great deal of litigation in which ***voir dires*** will have to be re-constructed years after the fact and where the State will be required to "explain reasons for challenges, a task that would be impossible in virtually every case since the prosecutor, relying on ***Swain***, would have had no reason to think such an explanation would some day be necessary." ***Allen v. Hardy***, 106 S.Ct. at 2881. Even notes taken during ***voir dire*** to protect against such an eventuality could be insufficiently precise to meet the "clear and reasonably specific" requirement of ***Batson***. 106 S.Ct. at 1724, n.20. In the face of such specificity requirements, many deligent prosecutors will be unable to meet the burden required. This will necessitate new trials in many cases in which the evidence of guilt was overwhelming - a clearly unwarranted expenditure of precious judicial resources.

The ***amici*** for Griffith suggest there will be little impact on the administration of justice if the Court limits ***Batson's*** retroactivity to those cases presently pending on direct appeal due to the ability of the State to assert procedural bar if the issue has not been perfected on appeal. However, even if procedural bar can be successfully asserted, ***Reed v. Ross***, 468 U.S. 1 (1984), the determination of that issue will engender much litigation. Further, if this ruling was so foreseeable that procedural bar is appropriate, then litigation on the issue of ineffective assistance of counsel for failure to assert a ***Batson*** issue is clearly to be anticipated in

the States' courts. Thus, while the disruption of the system of justice is less due to the barring of the ***Batson*** issue on collateral review, the courts of the amici states will still be significantly burdened with hearings the prosecutors will be ill equipped to defend against if this Court gives ***Batson*** any retroactive application. The outcome of many of the hearings will be new trials simply because a prosecutor or trial judge did not anticipate correctly what type of record he had to make prior to the decision in ***Batson*** being announced.

Moreover, the procedure to be employed to determine a ***Batson*** violation is uniquely unsuited for retroactive application. The Court, modifying the test employed to prove purposeful discrimination in a grand jury selection or in Title VII case, stated:

> ...a defendant may establish a prima facie case of purposeful discrimination in the selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant must first show that he is a member of a cognizable racial group...that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact...that peremptory challenges constitute a jury selection practice that permits those to discriminate who are of a mind to discriminate ...Finally the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury...raises the necessary inference of purposeful discrimination...Once the defendant makes a prima facie showing the burden shifts to the State to come forward with a neutral explanation for challenging black jurors...the prosecutor's explanation need not rise to the level of justifying a challenge for cause...But the

> prosecutor may not rebut the defendant's prima facie case...by stating merely he challenged the jurors of the defendant's race on the assumption..that they would be partial to the defendant because of this shared race...The prosecutor therefore must articulate a neutral explanation related to the particular case to be tried. The trial court then will have the duty to determine if the defendant has established discrimination. 106 S.Ct. at 1722-1724.

This test puts much reliance on the credibility determinations of the trial court to make the determination about the prosecutor's motives in using his peremptory strikes.

Batson suggests a finding of purposeful discrimination by a trial judge would be a finding of fact entitled to great deference. ***Batson v. Kentucky***, 106 S.Ct. at 1724, n.21; ***See also Anderson v. Bessemer City***, 470 U.S. ____, 105 S.Ct. 1540 (1985). These credibility determinations in turn are to be gleaned from supervising ***voir dire*** (n.22), and by observing such things as the "pattern" of strikes against black jurors, or the prosecutor's questions and statements during the ***voir dire***. However, such credibility determinations, as this Court has recognized in reviewing challenges for cause under ***Witherspoon v. Illinois***, 391 U.S. 510 (1968) are difficult to make based on a cold transcript of a ***voir dire*** since the demeanor of the juror cannot be recorded.[8] Justice Powell, writing for the majority in ***Patton v. Yount***, noted "Demeanor plays a fundamental role not only in determining jury credibility, but also in simply understanding what a potential juror is saying...Demeanor, inflection, the flow of questions and answers can make confused and conflicting utterances comprehensible." Further, as stated in ***Reynolds v. United States***, 98 U.S. 145, 156-157 (1879), "the manner of the juror while testifying is often times more indicative of the real character of his opinion than his words. That is seen below but cannot always be spread upon the record." De-

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[8]***Darden v. Wainwright***, ____U.S.____, 106 S.Ct. 2464 (1986) ***Wainwright v. Witt***, 469 U.S. ____, 105 S.Ct. 844 (1985) ***Patton v. Yount***, 467 U.S. 1025 (1984).

meanor as much as the actual answers given is often the basis for a prosecutor's peremptory challenge decisions. Inflections in the voice of the juror and prosecutor, the physical appearance of the juror, the nonverbal interaction between the juror and others in the courtroom - the body language - simply cannot be adequately memorialized in the transcript, yet these nonverbal considerations are imperative for a fact finder to know in order to make a reliable credibility determination as to the reasonableness in assuming a prima facie case has been established or that the neutral reasons proffered by the prosecutor are reasonable and truthful. "Trial Courts face the difficult burden of assessing prosecutors' motives"; ***Batson v. Kentucky***, 106 S.Ct. at 1718, (Marshall, J. concurring). This Court ought not make this task more burdensome by requiring courts to attempt to reconstruct long finished ***voir dires***. Reading a ***voir dire*** transcript[9] and then listening to a prosecutor trying as much as two years after the fact to articulate "seat of the pants instincts", ***Batson***, 106 S.Ct. at 1745, (Rhenquiest, J. dissenting) simply will put the trial court in no better position than an appellate court in determining whether purposeful discrimination has been shown. As this Court has noted, "despite its importance, the adequacy of ***voir dire*** is not easily subject to appellate review..." ***Rosales - Lopez v. United States***, 451 U.S. 182, 188 (1981). "Conclusions as to impartiality and credibility" [must be reached]" by ... evaluations of demeanor evidence and of responses to questions..." ***Rosales-Lopez v. United States***, 451 U.S. at 188.

An attempt to make a determination of a ***Batson*** issue after the trial is over and the jury is dismissed will deprive the fact finder of the majority of the components he needs to make a reliable credibility decision. Such unreliability ought to militate against retroactive application of ***Batson*** since the administration of justice will be disrupted without gaining any truly reliable determinations of the existence of ***Batson*** violations.

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[9]A transcript of the ***voir dire*** may not even exist in many cases. ***See, for instance*** N.C. Gen. Stat. § 15A-1241(a)(1) (1983).

As shown, retroactive application of ***Batson*** will work a hardship on prosecutors and courts in reconstructing long finished ***voir dires*** and explaining prior actions. The retroactive application of ***Batson*** will also work a considerable hardship on another extremely important segment of the system - the victims and witnesses of the crimes.

This Court, in both ***Morris v. Slappy***, 461 U.S. 1 (1983) and ***United States v. Hastings***, 461 U.S. 499 (1983), recognized that the rights of victims and witnesses to be free of the renewed trauma of a retrial was an important consideration to weigh in determining when to use the Court's supervisory powers. As stated in ***Morris v. Slappy, supra***:

> ...in the administration of criminal justice, courts may not ignore the concerns of victims...this is especially so when the crime is one calling for public testimony about a humiliating and degrading experience ...Precisely what weight should be given to the ordeal of reliving such an experience...need not be decided now; but that factor is not to be ignored by the courts. The spectacle of repeated trials to establish the truth about a single criminal episode inevitably places burdens on the system in terms of witnesses, records, and fading memories, to say nothing of misusing judicial resources." 461 U.S. at 15.

In retroactivity decisions, since the Constitution neither requires nor prohibits retroactive application of a ruling, the Court must engage in a balancing of interests. In looking at the impact on the administration of justice component, this Court should give great weight to the impact of retroactive application of this case to the truly innocent persons in the justice system - the victims of the crime and their families and the witnesses who will once more have to interrupt their lives and try to recall events they would probably rather forget. Sparing the victims and witnesses the agony of retrial should be an important component of this Court's weighing the effect of ***Batson*** on the administration of justice, especially since, as argued earlier, the new

constitutional rule has only a minimal impact on the truth finding fuction of a trial. Analysis of the third consideration in the ***Stovall*** test, like the first two considerations, clearly supports a finding by this Court that ***Batson*** ought not be applied retroactively to cases on direct appeal.

CONCLUSION

For nearly twenty years the States followed what they reasonably believed to be the holding in ***Swain*** in using peremptory challenges during jury selection. Policy considerations require that the States' good faith reliance in ***Swain*** be accorded deference since a retroactive application of this case will require many retrials. Since ***Batson*** represents such a clear break from prior precedent and since the rule in ***Batson*** will have minimal effect on the truth finding process, the amici request that this Court not apply ***Batson*** retroactively to cases still pending on direct appeal.

Respectfully submitted,

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